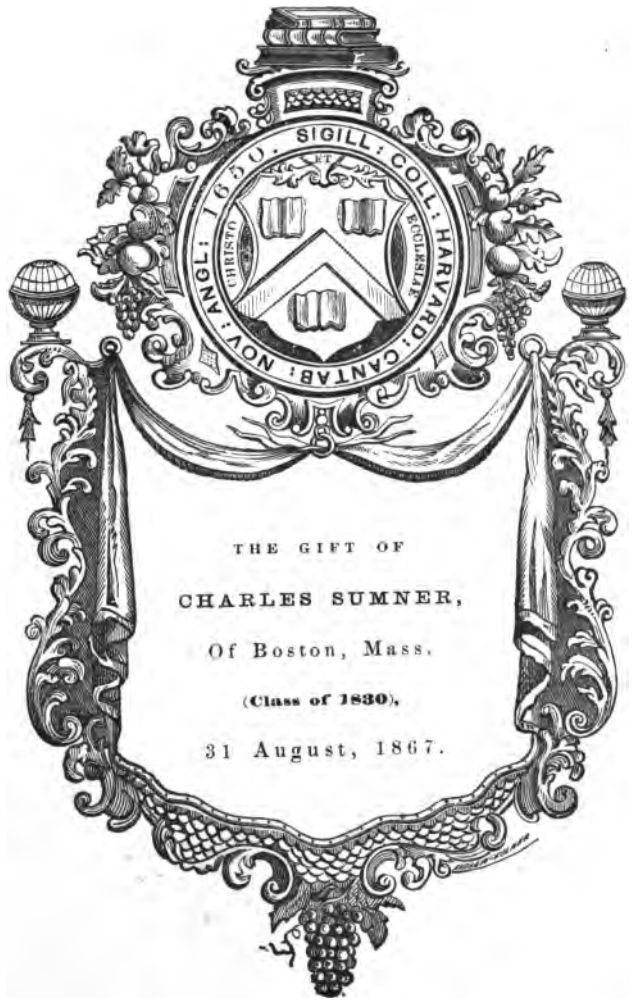

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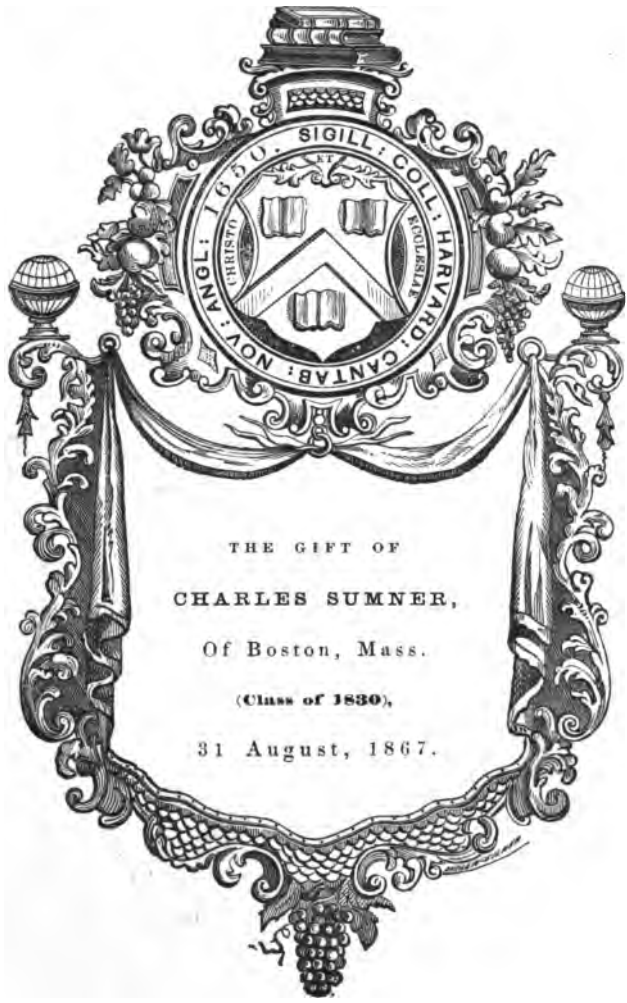

IN THE HOUSE OF LORDS,

THE 11TH, 14TH, 15TH, AND 17TH MARCH AND 6TH APRIL 1864.

BETWEEN

THE ATTORNEY GENERAL, - - APPELLANT,

AND

SILLEM AND OTHERS,
Claiming the Vessel "ALEXANDRA," seized under the Foreign Enlistment Act,
(59 George III. Chapter 69.) } RESPONDENTS.

REPORT OF THE ARGUMENTS

ON

The Case on Appeal against the Decision of the Court of Exchequer Chamber on the preliminary Objection to the Jurisdiction of that Court in Appeal under the New Rules of the Court of Exchequer applying the Common Law Procedure Acts to the Revenue Side of the Exchequer.

TOGETHER WITH

THE JUDGMENT OF THE HOUSE OF LORDS;

ALSO

AN APPENDIX CONTAINING A COPY OF THE PETITION OF THE ATTORNEY GENERAL AND OF THE JOINT CASE ON APPEAL TO THE HOUSE OF LORDS, WITH AN ABSTRACT OF THE APPENDIX THERETO;

AND ALSO

A GENERAL INDEX.

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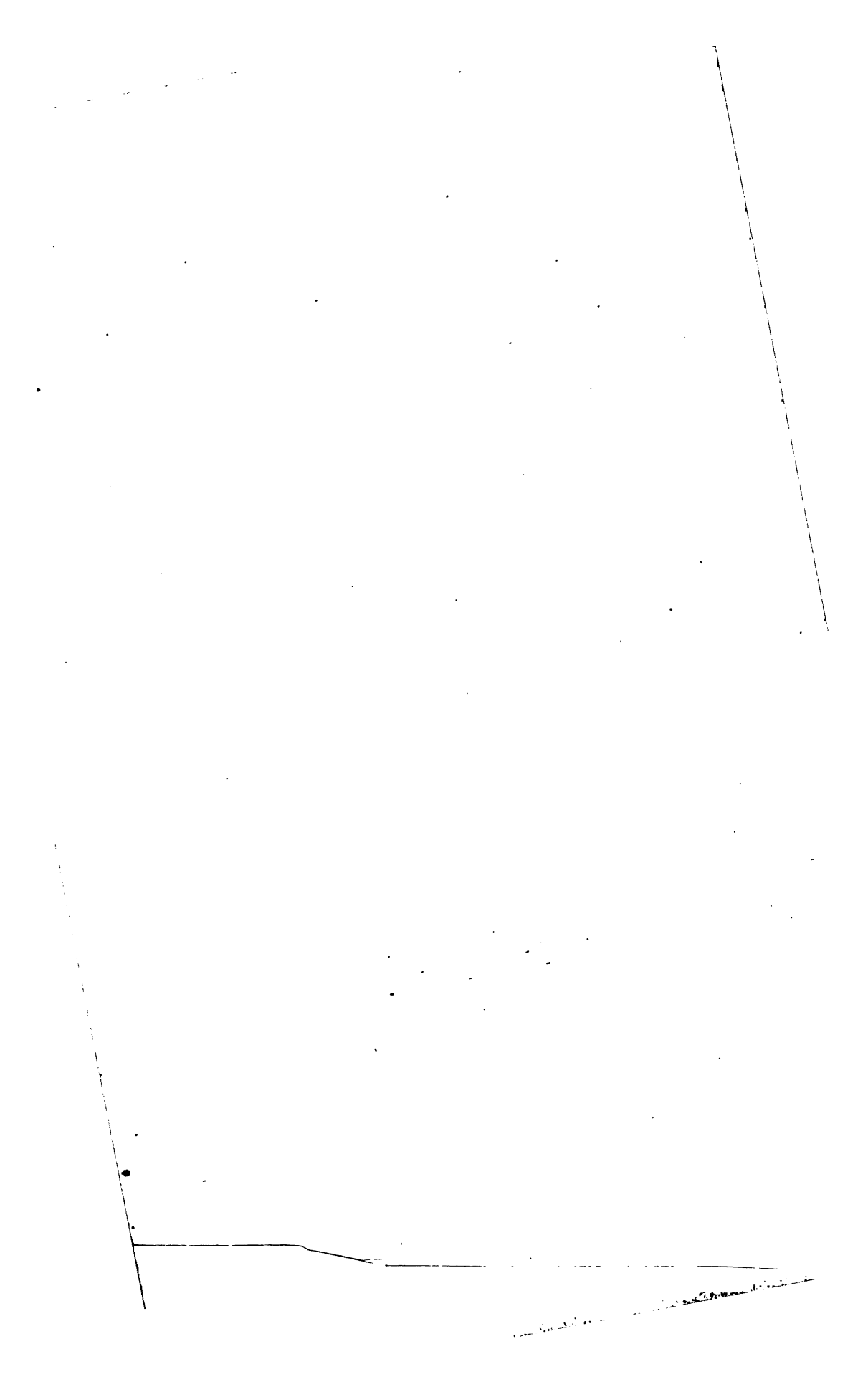

IN THE HOUSE OF LORDS.

PRESENT:

THE LORD CHANCELLOR.	LORD WENSLEYDALE.
LORD CRANWORTH.	LORD CHELMSFORD, AND
LORD ST. LEONARDS.	LORD KINGSDOWN.

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL, APPELLANT,

AND

HERMANN JAMES SILLEM AND OTHERS, CLAIMING THE "ALEXANDRA" - - } RESPONDENTS.

ARGUMENT

On Joint Case on Appeal from the Exchequer Chamber.

Friday, 11th March 1864.

ARGUMENT.

1st Day.

The Attorney General.

Mr. Attorney General.—My Lords, this is an appeal from a judgment of the Court of Exchequer Chamber, in a Revenue cause, carried to that Court by way of Appeal, in February last. Their Lordships dismissed the Appeal, and they did so in substance on the ground of incompetence, namely, that certain rules which had been made by the Court of Exchequer, the effect of which, if valid, would be, to give a right of Appeal by virtue of which the Crown was Appellant in the Exchequer Chamber, were *ultra vires* of the Court of Exchequer, and therefore void. In an extremely few words I may state the circumstances under which those rules were made, though, as I apprehend, those circumstances will not, one way or the other, affect their validity. The cause was an information of seizure *in rem* against a ship called the Alexandra which had been seized in April of the year 1863, on the alleged ground of a forfeiture under the Foreign Enlistment Act. The trial of that information came on before the Lord Chief Baron and a special jury in Trinity Term, 1863, and the jury then found a verdict for the Defendants. At the trial, the Crown proposed to tender a bill of exceptions, and something passed from which it was understood that there would be no formal difficulties in the way of settling that bill of exceptions afterwards. It turned out, however, that there were difficulties which had not been anticipated at the time, and, consequently, when Michaelmas Term arrived, no bill of exceptions having been settled or signed, and it not being probable, or at all events not certain, that those difficulties could be overcome, it was suggested by the Court that it would probably be the wiser course to move for a new trial, in order that any point of

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The Attorney General.

law might be brought before the Court of Appeal in that shape. Doubt then was immediately suggested, whether there was any power to carry a point of law, determined upon a motion for a new trial, before a Court of Appeal, as the law at that time stood; and, upon looking into the matter, it appeared that there was power given by the Queen's Remembrancer's Act, the 22nd and 23rd Victoria, chapter 21, (which is printed in the Appendix to the case at page 189,) for the Court of Exchequer to make rules to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts of 1852 and 1854 to the Revenue side of the Court. I will refer to the section more fully afterwards. And it was suggested on the part of the Crown, in the full belief that each party would have an equal chance of having the ends of justice advanced by such a course, that unless the Court saw any reasons to the contrary, founded upon general considerations, which did not occur to the Attorney General, it was in the power of the Court by making such rules before the motion for a new trial should come on, to remove any doubt or difficulty as to the appealable character of any order they might make, if that order turned upon a question of law. There was no argument against the Crown upon that occasion.

Sir Hugh Cairns.—It was *ex parte.*

Mr. Attorney General.—Yes, it was *ex parte,* and therefore of course my learned friends on the other side were not heard; and any argument that they might offer as to the competency of the Court to make those rules was entirely unprejudiced by what passed upon that occasion; but the Court, though, they were not assisted by the argument of my learned friend, thought they had the power, and made the rules in question; and your Lordships now have to determine whether those rules were validly made or not. If they were, it will not be disputed that the Court of Exchequer Chamber have come to an erroneous conclusion in dismissing the Appeal of the Crown, upon the ground upon which they did dismiss it. If they had no power to make those rules, then undoubtedly the conclusion of the Court of Exchequer Chamber was correct.

With that preface, it will be convenient for me, first, to read from page 191 of the Appendix the clause in the Act of Parliament which contains the authority on which we rely for the Court of Exchequer to make those rules, and then to refer to the rules themselves. The clause on which we rely in the Queen's Remembrancer's Act is the 26th, and it is in these terms "That it shall be lawful for the Lord "Chief Baron and two or more Barons of the Court of Ex- "chequer from time to time to make all such rules and orders "as to the process, practice, and mode of pleading on the Revenue "side of the Court, and as to the allowance of costs, and for the "effectual execution of this Act, and the intention and objects "thereof, as may seem to them necessary and proper; and also "from time to time by any such rule or order to extend, apply, "or adapt any of the provisions of the 'Common Law Procedure "Act, 1852' and the 'Common Law Procedure Act, 1854,' and

" any of the rules of pleading and practice on the Plea side of " the said Court to the Revenue side of the said Court as may " seem to them expedient for making the process, practice, and " mode of pleading on the Revenue side of the said Court, as " nearly as may be uniform with the process, practice, and mode " of pleading on the Plea side of such Court." My Lords, under that power the Court of Exchequer made the rule which immediately follows at the same page 191, in these terms: " In pursuance of the provisions contained in the 26th section " of the 22 and 23 Victoria, chapter 21, intituled, 'An Act to " 'regulate the office of Queen's Remembrancer, and to amend the " 'practice and procedure on the Revenue side of the Court of " 'Exchequer' it is ordered that the following provisions of the " Common Law Procedure Act, 1854, be extended, applied, and " adapted to the Revenue side of the Court of Exchequer; and " also that the following rules as to giving bail in cases of " appeal shall be in force on the Revenue side of the Court of Ex- " chequer." And then follow several provisions repeated, of course, as they only could be, *verbatim*, from the Common Law Procedure Act of 1854, which extend from that place to the letter F on page 192, and then follows a rule as to giving bail, adapted from one already made by the Court on a former occasion. The clauses taken out of the Common Law Procedure Act it may be convenient to read from the Act itself. If your Lordships will keep your eyes upon the rules at page 191 you will be able to follow me while I read the clauses from the Act of Parliament itself. Your Lordships will see that, in effect, they are simply the clauses of the Act, which the Court of Exchequer, if they have the power so to do, have declared shall be extended, applied, and adapted to the Revenue side of the Court of Exchequer. Those clauses, I think, begin with the 34th section of the Act of 1854, which is the 17th and 18th Victoria, chapter 125. If your Lordships will do me the favour to look at the rules while I read from the Act, your Lordships will see that the rules are merely the substance of the clauses of the Act. The 34th section is this: " In " all cases of rules to enter a verdict or nonsuit upon a point " reserved at the trial, if the rule to show cause be refused or " granted and then discharged or made absolute the party de- " cided against may appeal." The 35th is this: " In all cases of " motions for a new trial upon the ground that the Judge has " not ruled according to law, if the rule to show cause be re- " fused, or if granted be then discharged or made absolute, the " party decided against may appeal, provided any one of the " Judges dissent from the rule being refused, or, when granted " being discharged or made absolute, as the case may be, or, " provided the Court in its discretion think fit that an appeal " should be allowed." 36th. " The Court of Error, the Exchequer, " Chamber, and the House of Lords shall be Courts of Appeal, for " the purposes of this Act." 37th. " No appeal shall be allowed " unless notice thereof be given in writing to the opposite party, " or his attorney, and to one of the Masters of the Court, within

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The Attorney General.

" four days after the decision complained of, or such further time " as may be allowed by the Court or Judge." 38th. " Notice of " appeal shall be a stay of execution, provided bail to pay the sum " recovered, and costs, or to pay the costs where the Appellant was " Plaintiff below, be given, in like manner and to the same amount " as bail in error, within eight days after the decision complained " of, or before execution delivered to the Sheriff." 39th. " The " appeal herein-before mentioned shall be upon a case to be " stated by the parties; and in case of difference ——"

Lord St. Leonards.—That is No. 12 in the order.

Mr. Attorney General.—Yes, the words are exactly the same, and the order simply purports to enumerate the following provisions, that is, it purports to give them, as the provisions of the Act of Parliament, not as rules of its own. 39th. "The appeal " herein-before mentioned shall be upon a case to be stated by " the parties, (and in case of difference, to be settled by the Court " or a Judge of the Court appealed from,) in which case shall " be set forth so much of the pleadings, evidence, and the ruling " or judgment objected to, as may be necessary to raise the " question of the decision of the Court of Appeal." 40th: "When " the appeal is from the refusal of the Court below to grant a " rule to show cause, and the Court of Appeal grant such rule, " such rule shall be argued and disposed of in the Court of Appeal." 41st: "The Court of Appeal shall give such judgment as ought to " have been given in the Court below; and all such further pro- " ceedings may be taken thereupon as if the judgment had been " given by the Court in which the record originated." 42nd: "The " Court of Appeal shall have power to adjudge payment of costs, " and to order restitution; and they shall have the same powers as " the Court of Error, in respect of awarding process or otherwise." 43rd: "Upon an award of a trial *de novo* by any one of the " superior Courts, or by the Court of Error, upon matter appearing " upon the record, error may at once be brought; and if the judg- " ment in such or any other case be affirmed in error, it shall be " lawful for the Court of Error to adjudge costs to the Defendant in " error." 44th: "When a new trial is granted on the ground that " the verdict was against evidence, the costs of the first trial shall " abide the event, unless the Court shall otherwise order." 45th: " Upon motions founded upon affidavits, it shall be lawful for " either party, with leave of the Court or a Judge, to make " affidavits in answer to the affidavits of the opposite party, upon " any new matter arising out of such affidavits, subject to all such " rules as shall hereafter be made respecting such affidavits." The rules end thus: "The foregoing rules shall come into " operation, and take effect forthwith, and apply to every cause, " matter, and proceeding now pending."

Of course, it is not necessary for me to point out to your Lordships that it would be impossible, as everybody must admit, that without statutory authority, any such rules could have been made. They are not and do not purport to be rules emanating from the authority of the Court which made them,

they purport to be an extension and application to the Revenue side of the Court of Exchequer of certain provisions in a certain Act of Parliament, by virtue of the authority supposed to have been given by another Act, and, of course, if that authority was given by that other Act then there is an end of the question; the thing is properly done.

Now I will state to your Lordships the objections, as I understand them, which were made to the competency of the Court to make those rules, and I will state shortly the answer which we give to those objections. In the first place, it was said that the power contained in the 26th section of the Queen's Remembrancer's Act relates only to the process, practice, and mode of pleading on the Revenue side of the Court; that was the first proposition. Secondly, that anything which is procedure in error or upon appeal from the Court of Exchequer is not within the meaning of those words as used in the Act. Thirdly, that it is not to be presumed, without clear proof, that the Legislature could intend to delegate to the Court of Exchequer the power of giving an appeal in any case in which the Act itself had not given it. And fourthly, that on examination of the particular provisions of the Act the inference to be drawn from them is that the Legislature neither gave nor intended to give that power.

Now, my Lords, I will state shortly the general way in which we meet those points. We say, first, that "process, practice, and "mode of pleading on the Revenue side of the Court" means in this Act the entire procedure in any suit, commenced on the Revenue side of the Court from the beginning to the end; and that it is a *nomen generale.*

Lord Chancellor.—From the beginning in the Court of First Instance to the end in the Court of Appeal.

Mr. Attorney General.—The end must be in the Court of First Instance always; from the Writ issued to the judgment, and execution also, which is after judgment; and that comprehends everything intermediate as incident to it, even though in the intermediate course there should be a passage through the Court of Error or Appeal.

Lord Cranworth.—From the writ to the execution?

Lord Chancellor.—Including an intermediate appeal.

Mr. Attorney General.—Including everything intermediate, everything by which the record of the procedure in the suit can be affected either in its commencement, progress, or result.

Lord St. Leonards.—Do you include procedure in this House?

Mr. Attorney General.—Not of course a separate procedure in this House considered as an independent and separate Court; that I apprehend to be another thing; I do not think it would be necessary for my purpose to argue that, because the Act of Parliament has said, if it has authorized the application of the clause, that the House of Lords shall be the Court of Error for certain purposes; and the House of Lords regulates its own particular practice, and no regulation of the proper practice of the House of Lords is or could be contended to be delegated to any

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other body; but I do not think that any such consequence would be found to be involved in my proposition.

Lord St. Leonards.—It might be done by Act of Parliament, and if, therefore, the Barons had legislative power, the question is, have they done it?

Mr. Attorney General.—Yes.

Lord Chancellor.—You are at present giving the meaning of the words process, practice, and mode of pleading, and you have said that it includes everything from the beginning to the end, including the intermediate appeal; and, therefore, in your view of the case, the intermediate appeal becomes part of the procedure.

Mr. Attorney General.—I think so.

Lord Chancellor.—Supposing this case had remained in the Court of Exchequer, would there have been a judgment entered?

Mr. Attorney General.—Yes.

Lord Chancellor.—And execution?

Mr. Attorney General.—Yes, that is a writ of delivery, which is the same thing.

Lord Chancellor.—Against the Crown?

Mr. Attorney General.—Yes, against the Crown. And if, my Lords, it is a case capable of passing through the Court of Appeal, the proceedings of the Court of Appeal will determine the character of the judgment that should be given.

Lord Chancellor.—Is the form of the judgment *amoveas manus?*

Mr. Attorney General.—I do not think that that is the form, it is that in substance. Our second proposition is this,—that the Legislature, no doubt foreseeing, as we think, the very great objections that would be made to rules of this kind, resting solely upon the authority of this Court, has expressly authorized the Court to extend, apply, or adapt any, without exception, of the provisions of the Common Law Procedure Acts to the Revenue side of the Court; and we say that that authorizes the application to causes depending upon the Revenue side of the Court of all or any of the provisions of those Acts which can by possibility be applied to those causes. That is the second proposition.

Lord Chancellor.—Will you state that in a shorter form of words?

Mr. Attorney General.—That the clause expressly authorizes the extension of all or any of the provisions of those Acts, which are capable of being applied to causes on the Revenue side of the Court, to such causes.

Lord Chancellor.—Have I taken it down rightly thus,—any provisions in the Act of 1854 which are capable of being applied to Revenue causes may be transferred under that power?

Mr. Attorney General.—Just so; and then, my Lords, thirdly, that the purpose, for which that power is expressed to be given, by the words "as may seem to them expedient for making the process," and so forth, is one which cannot be completely accomplished if the provisions relative to error and appeal are not included. The purpose is to assimilate, as far as possible,

the procedure on the Revenue side to the procedure on the Plea side, and that purpose cannot be accomplished if you are to leave out all the procedure in Error or in Appeal. Then, my Lords, lastly, we say that there is nothing inconsistent either with principle or with what is to be found in this Act itself, in the supposition that that power was meant to be given to the Judges of the Court of Exchequer; and that the particular provisions of the Act, when examined, instead of disproving, rather tend to confirm the conclusion that such power was meant to be given, and is given.

Those, my Lords, are the propositions upon the one side and upon the other which we shall have to examine. Now I think it would be convenient, in doing so, to make a few observations at starting upon the condition in which the law had placed the right of appeal on the Revenue side of the Court of Exchequer antecedently to the passing of this Act. My Lords, there was beyond all doubt a right to bring proceedings in error from the Court of Exchequer upon the Revenue side. The learned judges who decided upon this case have assumed in their judgments a point which I do not know has ever been really a subject of decision or authoritative declaration, that the mode of raising questions of law by a Bill of Exceptions did not exist upon the Revenue side antecedently to the passing of this Act. Your Lordships will find it expressly given by this Act, if it did not exist before, so that we shall at all events argue the case upon the supposition that that mode of raising such questions now exists; but whether it existed before or not, from all the enquiry I have been able to make, may be a matter possibly of doubt and controversy. I am not aware of any proof that it did exist; I am not aware of any authority that it did not. If it did not, the ground must, I apprehend, have been this,—that the procedure by bill of exceptions originated in judicial practice, and was recognized by the second statute of Westminster which provided for the signature of bills of exceptions in certain cases, not expressly mentioning the Crown or Revenue cases; it may be, it was held not to be applicable to such cases. Whether that was so or not, the procedure in error was a subject of statutory regulation; and I will trouble your Lordships with a reference to some of the statutes upon that subject, because, besides introducing us to the position in which the right of appeal actually stood before this Act passed, if I do not deceive myself, they will be found even to give some assistance when we come to consider the particular construction to be placed upon the language which we find in this section. Now the right of appeal to that which afterwards came to be called the Exchequer Chamber was originally given, my Lords, by the 31st of Edward the Third, chapter 12, statute 1; it is the 12th chapter of the statute of Westminster, the 31st of Edward the Third, and the heading of it is this,—The Lord Chancellor and the Lord Treasurer shall examine erroneous judgments given in the Exchequer, and the English is in these terms: "Item, it is ordered

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The Attorney General.

" and established that in all cases touching the King or other " persons, where a man complaineth of error made in process " in the Exchequer,"—and I beg your Lordships to observe you have the word "process" there used in its largest sense,—"and " the Lord Chancellor and the Lord Treasurer shall cause to " come before them in any chamber of council nigh the Exchequer " a record of the process out of the Exchequer, taking to them " the justices and other sage persons such as to them seemeth " fit to be taken, and shall also cause to be called before them the " Barons of the Exchequer, to hear their informations, and the " causes of their judgments, and thereupon shall fully examine " the business, and if any error be found they shall correct and " amend the rolls, and after send them to the Exchequer for to " make there execution as pertaineth." It was to be in fact a convocation of the other judges at that time apparently selected by the Lord Chancellor and the Lord Treasurer, to meet in a chamber of council nigh the Exchequer, and there to meet the Barons of the Exchequer, to learn from them the causes of their judgment, having the record before them, and, if error were found, to correct and amend the rolls and send them back into the Exchequer to make execution as might be right. Lord Coke says in his 4th Institutes, at page 106, that the Council Chamber spoken of there is now called the Exchequer Chamber, because, "there was the assembly of all the judges, being the " King's Council, for deciding of matters in law; therefore the " Exchequer Chamber itself is in its origin a branch of the " Court of Exchequer." The next statute bearing upon that is the statute 31st of Elizabeth, chapter 1, which cut off one of the impediments to the convenient execution of the duties of that Court. After reciting the Act of the 31st of Edward the 3rd it goes on to say, that on account of the public duties of the Lord Chancellor and the Lord Treasurer, they were frequently called away, so as not to be able to be present at the proper time, from which inconvenience arose, then it is ordained " that " the not coming of the Lord Chancellor and the Lord Treasurer, " or either of them at the day of adjournment in any such suit " of error depending by virtue of the former statute, shall not " be any discontinuance of any such writ of error, but if both " the Chief Justices of either bench, or any one of the said " great officers, the Lord Chancellor, or Lord Treasurer, shall " come to the Exchequer Chamber and there be present at " the day of adjournment, in such suit of error it shall be " no discontinuance, but the suit shall proceed in law to all " intents and purposes as if both the Lord Chancellor and Lord " Treasurer had come and been present at the day and place of " adjournment; provided always, that no judgment shall be " given in any such suit or writ of error unless both the Lord " Chancellor and the Lord Treasurer shall be present thereat." The effect of that statute (which in its preamble spoke of the impossibility of both of those great officers being present at the Court of Exchequer, at the day of adjournment in such suit

of error,) was this, that it fixed the Court as a Court to consist both of the Chief Justices of either Bench, and one of those great officers, the Lord Chancellor or the Lord Treasurer, and did not require both of them to be present.

Lord Chancellor.—Does it use the words "writ of error?"

Mr. Attorney General.—Yes; the words "writ of error" do occur in that statute.

Lord Chancellor.—It struck me that you read words that gave that implication?

Mr. Attorney General.—"Suit or writ of error." That refers to the preamble, and the preamble runs thus,—"Whereas by a statute "made in the 31st of the reign of Edward the Third, it is enacted "that upon complaint concerning error made in the Exchequer "touching the King or other persons, the Lord Chancellor and "Lord Treasurer shall do to come before them in any chamber "of council nigh the Exchequer the record and process of the "Exchequer, and taking to them such justices and other safe "person as to them shall be thought meet," and so on.

Lord Chancellor.—Is there any trace of the form of the plaint of error at that time?

Mr. Attorney General.—None whatever; and it would appear, if I may judge from the first statute, that nothing was done except the bringing up of the record *simpliciter* to what we call the Exchequer Chamber, and then the Barons were to meet the other Judges there, and to give them information as to the causes of their judgments.

Then, my Lords, there were two other statutes passed upon the subject in the reign of Charles II., which I think settled this matter, as far as I know, in the position in which it remained till the statute of 1st William IV., which partly regulated the way in which the Exchequer Chamber was to be constituted according to the Court from which the appeal came. First of those is the 16th of Charles II., chapter 2, and there is nothing of importance to be mentioned as regards that, except that as the Act of Elizabeth had dispensed with the presence of both the Lord Chancellor and the Lord Treasurer, this dispenses with the presence of either of them, still, however, making their concurrence in the judgment necessary. There is nothing else in the language of that Act that I need mention. But then comes the 20th of Charles II., chapter 4, intituled "An Act for proceeding to judgment on Writs of "Error brought in the Exchequer," and that recites first the Act of the 16th of Charles II. in terms, referring also to that of Edward III., and then it goes on to say, "and whereas at this "present time there is no Lord Treasurer, and therefore by "reason of the said proviso no judgment can be had in any writ "or writs of error brought and yet depending or to be brought, to "the great charges and prejudice of His Majesty's subjects, and "delay of justice, for remedy wherein, be it therefore enacted by "the King's most excellent Majesty, by and with the advice and "consent of the Lords spiritual and temporal, and the Commons, "in Parliament assembled, that judgment shall or may be given

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The Attorney General.

" in any suit or writ or writs of error now depending or here-
" after to be brought in the Exchequer," (that is the language of the Act, " in any suit or writ or writs of error now depending " or hereafter to be brought in the Exchequer,") " in the presence " of the Lord Keeper of the Great Seal of England, notwith-
" standing the vacancy of a Lord Treasurer in such manner as " hath been accustomed when there was present the said two " great officers ; the said proviso in the said statute, or anything " else therein contained, to the contrary in anywise notwith-
" standing." That applies solely to error from the Exchequer, properly so called, and it actually describes it as a " suit or writ " of error now depending or hereafter to be brought in the " Exchequer," having reference solely to those two former Acts which related exclusively to error from the Court of Exchequer properly so called. Your Lordships therefore trace the modification of the Court through the different Acts,—in the first instance, concurrence both in the hearing and the judgment of the Lord Chancellor and the Lord Treasurer was necessary. Then their concurrence in the hearing was dispensed with first as to one and afterwards as to both ; and lastly, the concurrence in the judgment. And then by the Act of William IV., which throws no new light upon the question of phraseology or otherwise, as your Lordships know, the present constitution of the Exchequer Chamber was fixed.

Lord Cranworth.—Do you understand that to mean " suit of " error, or writ of error," or " suit or writ of error ? "

Mr. Attorney General.—I understand it to mean " suit of error, " or writ of error."

Lord Cranworth.—" Or " being read as " otherwise ? "

Mr. Attorney General.—Yes ; because I find the expression " suit of error " in the former Act ; but the word " suit," I imagine, is the pursuing of error. There it is still spoken of as depending in the Exchequer all the time. I cannot help asking leave to refer your Lordships to what Lord Coke says about the connexion of those different Courts in the Exchequer in the same 4th Institutes to which I referred before. He says at page 110, in the part dealing with the Court of Exchequer : " And into the Exchequer Chamber, or the like, all cases of the " greatest difficulty in the King's Bench or Common Pleas, &c. " are, and of ancient time have been adjourned and there de-
" bated, argued, and resolved by all the Judges of England and " Barons of the Exchequer. *See* more of this Court *infra* " cap. 13. pagin. 121." Then at page 119, which I think must be the page intended, at the last sentence of that chapter 13, which relates to the Court of Equity in the Exchequer Chamber, which we were so familiar with some years ago, he concludes with this sentence : " So as in the Exchequer there are these 7 Courts. " 1. The Court of Pleas," that is what is called the Plea side. " 2. The Court of Accounts. 3. The Court of Receipt," which would be the two Revenue branches. " 4. The Court of the " Exchequer Chamber being the assembly of all the Judges of

" England for matters in law. 5. The Court of Exchequer " Chamber for errors in the Court of Exchequer 31 Eliz. 3. " cap. 8. and 31 Eliz. cap. 1. 6. A Court in the Exchequer " Chamber for errors in the King's Bench, 27 Eliz. cap. 8.; " 31 Eliz. cap. 1. Co. Pl. Intr. fo. 2, 24, 37, and 7, this Court " of Equity in the Exchequer Chamber." So that the Court of Error from the Court of Exchequer in the Exchequer Chamber sat under distinct statutes, which very much simplified the process there, still preserving its connexion with the Court of Exchequer, and that state of things continued under those statutes till a very recent time.

Now, my Lords, I think the next thing that it would be convenient to do, would be first to introduce your Lordships as concisely as I can to these Common Law Procedure Acts to which reference is made in the Queen's Remembrancer's Act. There are only two of them we need deal with. There is one later Act, which is not of course in question. The Common Law Procedure Act of 1852, the 16th and 17th Vict. c. 76, to which reference is made in that Act, is this—it is entitled " An " Act to amend the process, practice, and mode of pleading in " the superior Courts of Common Law at Westminster, and in " the Superior Courts of the counties Palatine of Lancaster and " Durham," and the preamble runs thus " Whereas the process, " practice, and mode of pleading in the Superior Courts of " Common Law at Westminster may be rendered more simple " and speedy, be it enacted by the Queen's most excellent " Majesty, by and with the advice and consent of the Lords " Spiritual and Temporal, and Commons in this present " Parliament assembled, and by the authority of the same, as " follows": that is an adoption, as has been noticed in one of the judgments, (I think that of Mr. Justice Williams, in the Court below,) of the phraseology which had been employed by the Crown, in the commission to the Commissioners, who were to enquire into this subject, and upon whose report and recommendation this Act was founded. They were appointed to enquire into the process, practice, and mode of pleading in the Superior Courts of Common Law at Westminster. In the execution of that duty, and as not foreign to it, they entered into the whole procedure in error and in appeal, and the Act founded upon their recommendations does the like, describing the subject matters with which it deals under this title: the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law, at Westminster.

Lord Chancellor.—How comes it that that phrase does not include the Court of Exchequer?

Mr. Attorney General.—I can answer that question at once, if your Lordship will do me the favour to look at the interpretation clause. Clause 227 is the answer to that question, though it is indicated in other places. " In the construction of this Act " the word action shall be understood to mean any personal " action brought by writ of summons in any of the said Courts."

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That pervades the whole, and therefore in truth it would not be applicable to any proceeding which did not come within that definition, which was not an action commenced by writ of summons in any of the Courts. Therefore, though the Plea side of the Court of Exchequer is not expressly mentioned, yet as such actions may be commenced by writ of summons there, it applies to such actions; and though the Revenue side is not mentioned by way of exclusion, yet as those are not actions commenced by writ of summons, it would not apply to them. I ask your Lordships' particular attention to the phraseology of the preamble, because it is the same phraseology which we find and have to deal with, and upon which the argument is founded, in this 26th section of the Queen's Remembrancer's Act. The words "process," "practice," and "mode of pleading," are used in the Act of 1852 for the purpose of expressing the aggregate of procedure in as large a sense as that in which it is found to be dealt with afterwards by the clauses of that Act; and the same phraseology is preserved and adhered to in the 26th clause of the Queen's Remembrancer's Act, in which power is given to extend, apply, or adapt any of the provisions of that and the subsequent Act.

Then, my Lords, I may state as far as is material, the substance of those provisions of this Act of 1852, to which it may be useful to direct your attention, passing over a number of sections which relate to other matters.

Lord Chancellor.—You say that in the preamble "the process, "practice, and mode of pleading" is equivalent to procedure?

Mr. Attorney General.—Yes, my Lord.

Lord Chancellor.—But that "process, practice, and mode of pleading," in the preamble cannot be held to indicate any new provision given by the Act, because it is that it may be rendered more simple and speedy.

Mr. Attorney General.—Yes, my Lord; I take it, that the object is to make such improvements in the procedure of the Superior Courts of Common Law as may have the effect of rendering that procedure more simple and speedy.

Lord Chancellor.—That must mean "procedure" as then existing?

Mr. Attorney General.—No, I think not; because it contemplates an amendment for the purpose of making it more simple and speedy, and all the alterations and amendments, however widely they may depart from the procedure in use before, are still amendments or alterations introduced into the process, practice, and mode of pleading, for the purpose of making it more simple and speedy. And your Lordships will find that it is a most salutary but extensive revision of the whole procedure as it existed before.

I was going to call your Lordships' attention to those portions of the Act which may be found capable of connecting themselves, more or less, with the argument which I will have to address to your Lordships. I pass over the early part relating to various

proceedings in suits, as nothing will turn upon that; and the first, which I ask your Lordships' attention to, are clauses 102 to 116; those relate to trials at *Nisi Prius*. It may be in your Lordships' recollection, perhaps, that by the 2nd and 3rd Victoria, chapter 22, the practice as to trials on the Assizes, which had been applied to the other Courts, namely to the Court of King's Bench and to the Court of Common Pleas, by the statute of Westminster, 13th Edward I., was extended to the Plea side of the Court of Exchequer, and it will be convenient, I think, that I should state the effect of that Act to your Lordships before I refer to those clauses. It was an Act to enable the Justices of Assizes on their circuits to take inquisition of all pleas in the Court of Exchequer of Pleas which shall be brought before them, without a special commission for that purpose; it recites the 13th of Edward I., chapter 30, which authorized "the "Judges of Assize on their several circuits to take inqui- "sition of all pleas in the Courts of Queen's Bench and "Common Pleas, and then it recited that it was expedient to "extend that power to pleas in the Court of Exchequer, in order "to put an end to the practice which has hitherto obtained, of "issuing a separate commission from the said Court upon each "record brought therefrom before the Judges of Assize," and that accordingly was done. So, as to the Plea side of the Court of Exchequer, the effect of that Act was to give the same power to the Judges of Assize, under their commissions from the Crown of Oyer and Terminer, to take inquisition, that is, to try cases originating upon the Plea side of the Court of Exchequer, which they had before by statute as to cases originating in the Queen's Bench and Common Pleas; but that was not extended to the Revenue side. Your Lordships will find, I think, that that Act will have a bearing, and a useful one, upon some portion of the argument which is made upon the 26th clause; it has been so treated by Mr. Justice Willes, and, I think, in a way which is very logical and very sound.

Now I ask your Lordships' attention to the fact, that we have the whole of the *Nisi Prius* practice regulated in the Common Law Procedure Act of 1852, by clause 102, and the other clauses which follow that down to 116. I am not going to read them through, it is quite unnecessary that I should do so. I only ask your Lordships' attention to the fact that this procedure, which takes place *extra curiam* of the Exchequer when causes go from the Court of Exchequer to trial at the Assizes—this procedure which takes place before the Judges of Assize, under the Queen's commission, whether they be members of the Court of Queen's Bench or the Court of Common Pleas, or any other Court, is regulated in considerable detail by the Common Law Procedure Act of 1852. Then we come to the sections about error. Your Lordships will find that this Common Law Procedure Act of 1852 deals largely with the subject of error. The first clause on the subject, I think, which is material, is the 146th.

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Lord Cranworth.—It may be well worth observing that that begins with a little preface of "And with respect to proceedings "in error ——"

Mr. Attorney General.—Yes. Your Lordships will find all through the Act prefaces of that kind occur from time to time when a new subject is arrived at; for instance, the preface of the clauses to which I have just referred was "With respect to "the Nisi Prius Record, be it enacted as follows." And also clause 100 is preceded by this "And with respect to judgment "for default in not proceeding to trial and so on"—all through the Act the different heads of the subject are taken up by sub-preambles of that kind, and this 146th section, as your Lordship observes, is preceded in this way, "and with respect to pro-"ceedings in error, be it enacted as follows." Then follow a number of provisions, which extend from 146 to 167 inclusive, of which, my Lords, I shall only refer your Lordships to four in particular—148, 155, 156, 157, all of which contain something deserving attention. 148 is this: "a writ of error shall not be "necessary or used in any cause, and the proceedings to error "shall be a step in the cause, and shall be taken in manner "herein-after mentioned, but nothing in this Act contained shall "invalidate" prior proceedings. That, my Lords, with regard to whatever falls under the category of error, properly so called, and as governed by those clauses, is decisive, as showing that the proceeding to error is regarded, not as the commencement of anything which is in the view of this Act an independent suit, but as a continuation of the same proceeding, a step in the same cause. Then I ask your Lordships' attention to 155 and the two following clauses. The intermediate ones show what the proceedings are which are to be taken before the error leaves the Court from which it proceeds—how the roll is to be made up and suggestion to be entered, and how bail is to be given, and so on—all of which, though part of the procedure in error, are steps to be taken literally in the Court from which the error is brought. Then we come to 155: "Upon such suggestion of error alleged and "denied being entered, the cause may be set down for argument "in the Court of Error in the manner heretofore used, and the "judgment roll shall, without any writ or return, be brought "by the Master into the Court of Error in the Exchequer "Chamber, before the Justices, or Justices and Barons, as the "case may be, of the other two Superior Courts of Common Law "on the day of its sitting, at such time as the Judges shall "appoint, either in term or in vacation, or if the proceedings in "error be before the High Court of Parliament, then before the "High Court of Parliament, before or at the time of its sitting; "and the Court of Error shall and may thereupon review the "proceedings, and give judgment as they shall be advised "thereon; and such proceedings and judgment as altered or "affirmed shall be entered on the original record, and such "further proceedings as may be necessary thereon shall be

" awarded by the Court in which the original judgment was " given." The next clause, 156, is: " Courts of Error shall have " power to quash the proceedings in error in all cases in which " error does not lie, or where they are taken against good faith, " or in any case in which proceedings in error might heretofore " have been quashed by such Courts; and such Courts shall in " all respects have such jurisdiction over the proceedings as " over the proceedings in error commenced by writ of error." Clause 157 is this: " Courts of Error shall in all cases have power " to give such judgment, and award such process, as the Court " from which error is brought ought to have done, without " regard to the party alleging error." Those three clauses, my Lords, tell us what is to be done in that which we call the Court of Error itself, whether it be the Court of Exchequer or the House of Lords.

Lord Chelmsford.—The main clause, 148, is embodied in the Queen's Remembrancer's Act, and extended to the Revenue side of the Court of Exchequer.

Mr. Attorney General.—Yes. I take the effect of those clauses to be this.—Formerly a writ of error was technically a new proceeding, though it had obviously a natural connection with the original one, and the result was that the judgment was given in the original Court, but that is now considered to be an inconvenient distinction, and so far at all events, as error is concerned, henceforth it is to be a step in the cause. All the preparatory proceedings are to be taken under various regulations in the Court from which the error itself is brought, and then those three clauses, 155 and the two following, tell you what the Court of Error is to do before it returns, and in order to return the corrected record, and then it returns into the Court from which it came, and the proceeding is to take place as if the Court had originally given the judgment, which the Court of Error has given instead.

Lord Chancellor.—All those regulations apply only to cases where a writ of error would lie.

Mr. Attorney General.—Quite so.

Lord Chancellor.—Do you mean to make this bear upon your interpretation of the effect of the words " process, practice, " and mode of pleading?"

Mr. Attorney General.—Partly so; my proposition as to that is this,—The Legislature, when executing their purpose of amending and rendering more simple and speedy the process, practice, and mode of pleading of the Superior Courts of Common Law at Westminster, saw that it was impossible do deal with that subject as a whole, if you neglected the means which the law provided of correcting error which might be made in those Courts, and more especially in the records of those Courts, which, beginning there had to return there, and to be executed there; and the Legislature therefore, so far as error is concerned, with which alone those clauses deal, treats error as part of the pro-

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cedure in the suits in the Court out of which the error arises, and regulates the procedure in that point of view, both in the Court from which the error is brought and in the Court of Error by which the correction is to be administered.

Lord Chancellor.—But does not extend or enlarge the jurisdiction.

Mr. Attorney General.—But does not extend or enlarge the jurisdiction in any way whatever. It simply regulates in certain ways the mode of correcting erroneous judgments, and says that for that purpose the proceeding to error shall be a step in the cause, and treats the whole of it as coming within the meaning of the phrase, "process, practice, and mode of pleading in the "Superior Courts of Common Law at Westminster." Now, my Lords, I do not think I ought to trouble you with the various matters which we find in this Act further than just mentioning their nature; they introduce into the process and practice of those Courts new remedies, very large, exceeding any which could have been administered before. By way of example, I will mention one or two of which I have made a note. In the case of an action in ejectment by a mortgagee, the 219th section gives the Courts of Common Law the power, on payment being tendered, to order a reconveyance. That, of course, is a very great enlargement of the remedy administered in those Courts.

Lord St. Leonards.—It is an adoption of the equitable rule.

Mr. Attorney General.—Just so; and there are other clauses which might be referred to of the same character. Then, my Lords, you will find that by the 228th section power is given to "Her Majesty from time to time, by an Order in Council, to "direct that all or any part of the provisions of this Act, or of "the rules to be made in pursuance thereof, shall apply to all or "any Court or Courts of Record in England or Wales, and within "one month after such order shall have been made and published in the London Gazette such provisions and rules "respectively shall extend and apply in manner directed by such "order, and any such order may be in like manner from time to "time altered or annulled." I may observe, in connection with that clause, that it appears to have been defective as originally passed in not providing for the case, which might be necessary to be provided for, of some supplementary provisions being made in order to render applicable that which, simply as it stands in the Act, would not be so; and in the subsequent Act of 1854 your Lordships will find a corresponding clause, which enlarges that power under both Acts. It is the 105th clause of the Common Law Procedure, the 17 and 18 Vict., and it provides that "It shall be lawful for Her Majesty from time to time, by Order in Council, to "direct that all or any part of the provisions of this Act, or of the "rules to be made in pursuance thereof, shall apply to all or any "Court or Courts of Record in England and Wales, and within "one month after such order shall have been made and published "in the London Gazette, such provisions and rules respectively

" shall extend and apply in manner directed by such order, and " any such order may be in like manner from time to time " altered and annulled, and in and by any such order Her Ma- " jesty may direct by whom any powers or duties incident to the " provisions applied under this Act or the Common Law Pro- " cedure Act, 1852, shall and may be exercised with respect to " matters in such Court or Courts, and may make any orders " or regulations which may be deemed requisite for carrying into " operation in such Court or Courts, the provisions so applied." Going back to the Act of 1852, I have only to mention one other provision in it, viz., the 223rd clause, which gives power to the Judges of the three Courts, the Queen's Bench, the Common Pleas, and the Exchequer, " or any eight or more of them, " of whom the chiefs of each of the said Courts shall be three, " from time to time to make all such general rules and orders for " the effectual execution of this Act, and of the intention and " object hereof," and for other purposes, there mentioned, as they may think fit; and accordingly, under those powers contained in this Act, and under similar powers in the later Act, various rules and orders were made, to some of which I shall afterwards call your attention.

The next Act is the Act of 1854, which introduces several further and important improvements. My Lords, that is entitled " An Act for the further amendment of the process, " practice, and mode of pleading and enlarging the jurisdiction " of the Superior Courts of Common Law at Westminster, and " of the Superior Courts of Common Law of the counties " palatine of Lancaster and Durham." There is no preamble to it, but it is obviously an Act in *pari materia* and in continuation of the same amending operation; and the words as to enlargement of jurisdiction obviously have reference to the new powers which it confers, some of which I will mention, with respect, for example, to granting injunctions, compelling discovery, and admitting equitable pleas.

Lord St. Leonards.—Originally it was intended to have a great scope.

Mr. Attorney General.—This was intended to enlarge the jurisdiction of the superior Courts.

Lord Cranworth.—I think there is a clause in it (I am speaking from recollection), that it is to be read as part of the other Act.

Mr. Attorney General.—The first clause of that Act gives power by consent for a judge to try questions of fact without a jury. That we need not trouble ourselves with. Then follow a series of clauses on the subject of arbitration, which may be divided into two branches, to the first of which our attention may be perhaps usefully directed. The second is not important; the second relates only to private agreements to arbitrate, which may be dealt with in a certain way by the Court. The clauses I refer to are from 3 to 10, and it may be important that attention should be directed to them. The third

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is this: " If it may appear at any time after the issuing of the " writ to the satisfaction of the Court or a Judge, upon the " application of either party, that the matter in dispute consists " wholly or in part of matters of mere account which cannot " conveniently be tried in the ordinary way,"—then there is power to send it to compulsory arbitration, and then the following clauses, including the 10th, regulate the proceedings consequent on the exercise of that power. Then the 27th clause is noticeable as introducing a new rule of evidence, comparison of handwriting. Then we come to the 32d clause, which gives error upon a special case. Clause 32 is in these terms: " Error " may be brought upon a judgment upon a special case in the " same manner as upon a judgment upon a special verdict, unless " the parties agree to the contrary; and the proceedings for " bringing a special case before the Court of Error shall, as " nearly as may be, be the same as in the case of a special " verdict, and the Court of Error shall either affirm the judg- " ment, or give the same judgment as ought to have been given " in the Court in which it was originally decided, the said Court " of Error being required to draw any inferences of fact from " the facts stated in such special case, which the Court where it " was originally decided ought to have drawn."

Lord St. Leonards.—You have printed from 32 to 42 in the Appendix.

Mr. Attorney General.—Yes, my Lord. I am not going to read again those which I have already read once, being the clauses adopted in the present rule, but the 32nd is not one of those. The 32nd is in the body of the Queen's Remembrancer's Act enacted by that Act, and therefore, of course, is not adopted by any rule of Court. That enables " error to be brought upon a " judgment upon a special case in the same manner as upon a " judgment upon a special verdict, unless the parties agree to the " contrary; and the proceedings for bringing a special case before " the Court of Error shall, as nearly as may be, be the same as in " the case of a special verdict, and the Court of Error shall either " affirm the judgment or give the same jndgment as ought to have " been given in the Court in which it was originally decided, the " said Court of Error being required to draw any inferences of " fact from the facts stated in such special case which the Court " where it was originally decided ought to have drawn." That your Lordship will observe depends upon agreement. The parties may agree upon a special case, and then error may be brought upon the judgment upon it, if the parties do not agree to the contrary. Then follows that series of clauses, which I have already read, applicable to appeals upon rules discharged, or made absolute, which of course I do not read again; and then later in the Act we have these subjects. I am not going to trouble your Lordships with more than an enumeration of the points dealt with—clause 50 gives power to compel the discovery of documents in the possession of the adverse party, plaintiff or defendant; sections 51 to 54 authorize the Court to direct the

examination of parties on interrogatories; section 58 authorizes the Court to make orders for the inspection of anything that may be the subject matter of the action, by the party or by the witnesses as well as by the jury. Then sections 60 to 67 are the garnishee clauses; section 78 enables the Court to order specific delivery of chattels; sections 79 to 82 authorize the Court to grant injunctions; sections 83 to 86 authorize the Court to receive equitable defences; and then the same power is given to make rules, and the same power is given for Her Majesty to apply the provisions to other inferior Courts of Record, which I read before. Also there is a new action of mandamus given by some of the clauses.

Lord Chancellor.—In the 36th section, what is the meaning of the words "Court of Error?"

Mr. Attorney General.—I think the reason why the words "Court of Error" are introduced there probably is this,—that with respect to two Courts specially dealt with by these Acts, namely, the Courts of Lancaster and Durham, at clauses 100 and 102, the Court of Queen's Bench, being the Court of Error from the Court of Common Pleas at Lancaster and the Court of Pleas at Durham respectively, is also made a Court of Appeal from the said respective Courts for the purposes of this Act in reference to motions for new trials.

Lord Chancellor.—I observe those words "Court of Error" in the rule.

Mr. Attorney General.—Yes; because the rule, I apprehend, simply mentions the provisions in the Act of Parliament, which are to be applied to the Court of Exchequer; it does not leave those words out of the clause, which it copies out of the Act of Parliament.

Lord Chancellor.—What is the effect then of those words in the rule?

Mr. Attorney General.—In the rule, they would simply have no effect, of course, unless they were held to be applicable in the construction of the clause as it stands in the Act of Parliament to the proper Court of Error, whatever it may be, from any Court.

Lord Chancellor.—You do not mean to contend then that there was authority to make the Court of Queen's Bench a Court of Error?

Mr. Attorney General.—Certainly not.

Lord Chancellor.—The language of the rule is so, is it not?

Sir Hugh Cairns.—In place of saying as the Act does "for "the purposes of this Act," the rule says "for this purpose."

Mr. Attorney General.—The words of the rule are "It is "ordered that the following provisions of the Common Law "Procedure Act, 1854, be extended, applied, and adapted."

Lord Chancellor.—The framer of that rule seems to have thought he could make the Court of Error, whatever it may be,

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the Court of Error from the Court of Exchequer on the Revenue side.

Mr. Attorney General.—I do not think more was intended, than simply to indicate the provision of the Act of Parliament that was intended to apply to the Revenue side of the Court; and that is sufficiently done, the words "Court of Error" occurring in that clause, the words "for this purpose" being, I think, in the rule exactly similar to the words "for the purposes "of this Act."

Lord St. Leonards.—Has your attention been called to section 13 of the Queen's Remembrancer's Act?

Mr. Attorney General.—Yes, my Lord.

Lord St. Leonards.—Where a new appeal is given under the Succession Duty Act, it says, "Such appeal as aforesaid shall be "made to the Court of Error in the Exchequer Chamber, and "the decision of the said Court of Error shall be subject to ap-"peal to the House of Lords. Therefore that speaks of the Court of Error as the Court of Error which we all know to exist in the Exchequer Chamber.

Mr. Attorney General.—Everybody knows that when there is error from the Exchequer it goes to the Exchequer Chamber, and from the Exchequer Chamber to the House of Lords, and when the Legislature, in a case that was perfectly new, gives a new appeal not provided for by the Common Law Procedure Acts or otherwise, it follows that course. Your Lordships may be perhaps referred conveniently on that point to the 11th George IV. and 1st William IV., Chapter 70.

Lord St. Leonards.—How do you reconcile the order which was made by the Barons, No. 3, to which the Lord Chancellor has been calling your attention, with section 13 of the Queen's Remembrancer's Act.

Mr. Attorney General.—There is not the smallest difficulty whatever in it, because it relates to a totally different subject. It may or may not be open to the objection that the words "Court of Error," being there transcribed from the Act of Parliament, are inofficious, but section 13 relates to a totally different subject. Section 13 relates exclusively to appeals from assessments of the Commissioners of the Inland Revenue to the Court of Exchequer, under the provisions of the Succession Duty Act, 1853. That is a perfectly new appeal from the proceeding defined by the Succession Duty Act, and quite *sui generis*, and not in any degree connected with the other subject. I will deal with those clauses as the learned Judges in the Court below have dealt with them, when I take the argument a little more in detail.

Lord Kingsdown.—Is this rule accurately printed?

Mr. Attorney General.—I believe it is; it might possibly have been better if the very words of the clause had been adopted without any verbal alteration.

Lord Chelmsford.—I think the little word "in" has been left out by mistake, and that it should be the "Court of Error in the "Exchequer Chamber."

Lord Wensleydale.—Probably it only means the Court of Error, that is to say, the Exchequer Chamber, or the House of Lords, shall be Courts of Appeal.

Mr. Attorney General.—Or it may be, that the words have been simply transcribed out of the clause of the Act of Parliament, as far as it goes, shortening the expression at the end, and using the words "for this purpose." instead of "for the purposes of "this Act." I feel, my Lords, upon this point very great confidence indeed. If in other respects your Lordships should concur with the argument I submit, no difficulty will be created by the form of that portion of the rule, because we are dealing with the Court of Exchequer Chamber and the House of Lords, and if there was power to adopt the clause of the Act of Parliament as to the Exchequer Chamber and the House of Lords, that certainly has been done, whatever else may have been superfluously expressed by the introduction of those words "Court of Error;" and I think your Lordships would not be at all troubled with difficulty in respect of that.

Lord Chelmsford.—What Court of Error was there except the Exchequer Chamber?

Mr. Attorney General.—For this purpose none whatever.

Sir Hugh Cairns.—In the Common Law Procedure Act there was another Court of Error.

Mr. Attorney General.—Only as to those two Courts mentioned.

Lord Chelmsford.—Durham and Lancaster.

Mr. Attorney General.—Yes.

Lord St. Leonards.—The Queen, by extending the Act to any other inferior Court of Record, would have made the Queen's Bench a Court of Error for that Court of Record also.

Mr. Attorney General.—The Queen would have had that power; but those words have only a distinct application with regard to the two particular Courts of Durham and Lancaster. I was going upon that point to direct your Lordships' attention to the 11th George IV. and 1st William IV., chapter 70, which contains a clause regulating the Exchequer Chamber, and after having spoken of His Majesty's Superior Courts of Common Law, in the earlier sections, it says this: "Be it further enacted, that "writs of error upon any judgment given by any of the said "Courts shall hereafter be made returnable only before the "Judges, or Judges and Barons, as the case may be, of the other "two Courts in the Exchequer Chamber, any law or statute to "the contrary notwithstanding," So that it is quite clear that the Court of Error from the Exchequer is the Exchequer Chamber, and that no other Court of Error can possibly be the Court of Error with reference to the Court of Exchequer.

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Lord Chancellor.—The 36th section of the Act of 1854 is a new enactment creating new Courts of Error; do you hold that enactment to be a provision relating to process, practice, and mode of pleading?

Mr. Attorney General.—I think so, my Lord, within the meaning of those words, as used in the Common Law Procedure Acts, as evidenced by the preamble. Your Lordships will observe that it is simply a clause which permits questions of law, which always might be brought by one proper mode to the Court of Error, to be brought in an additional mode more convenient for the purpose, and that is in truth the nature of all those provisions, as I will show you afterwards.

Lord St. Leonards.—The words have been copied from the Common Law Procedure Act. In the Act of Legislation of the Barons they have copied it from the other Act. In the first Act it is right; in the Barons' Act it appears to be incorrect and wrong.

Mr. Attorney General.—I do not think it will be found to be so for any practical purpose, because the enacting part of the rule of the Barons, if I may use the word "enacting," is this: "It is ordered that the following provisions of the Common Law "Procedure Act, 1854, be extended, applied, and adapted to the "Revenue side of the Court of Exchequer." They do not purport to be enacting anything of their own; they purport simply to be extending, applying, and adapting, under Parliamentary power, the following provisions of the Common Law Procedure Act of 1854.

Lord St. Leonards.—You do not mean to argue they were taking them at haphazard, not seeing whether they would apply or not; they had to see what would apply; they were bound to see that they were properly applicable; they were legislating as it were?

Mr. Attorney General.—Of course we may use what words we please; but I apprehend if the Legislature has said Her Majesty or the Court may extend, apply, or adapt certain provisions of any existing Act of Parliament to a different purpose, the Legislature gives force to that which is done, the whole Act of legislation is done by the Legislature, though it is made to depend upon something afterwards to take place in the exercise of the discretion of persons in whom the Legislature places confidence. The legislation is found in the Act of Parliament. The Act of Parliament says with reference to a particular subject matter, it is not to operate *per se*, it may operate if certain persons, namely the Judges of a particular Court, think fit to apply it.

Lord Chancellor.—The sum of what you say is that the rule, *quoad* those words "the Court of Error" was a mistake, and was *ultra vires* of the Barons.

Mr. Attorney General.—My Lords, I do not say *ultra vires* of the Barons. I look upon them as *in*officious, as operating nothing.

Lord Chancellor.—If they had power to use them they cannot be inofficious; if they are inofficious, there was no power to use them.

Lord Wensleydale.—Suppose they were left out. Still the Act would operate. *The Attorney-General.*

Mr. Attorney General.—Yes, I think so.

Lord St. Leonards.—I think there should be an amended Act by the Barons.

Mr. Attorney General.—I take the liberty of demurring to the use of the word "Act" at all, as applied to that which the Barons have done. When the Legislature gives a power of this description, it depends entirely upon the Act of the Legislature, and if it has been rightly pursued, I respectfully say it is not a correct use of language to speak of a rule made by the Barons under a power such as that which the Legislature has conferred on the Barons as an Act at all. And if this is capable of operation within the limits of the power given by the Act of Parliament, the mere fact that those words "Court of Error" may have been transcribed into it from the Act of Parliament, without really making any difference in the sense or effect of the clause, will not in the least degree prevent the operation of the rule, with regard to that which was within the power and which was applicable to the subject.

Lord Chelmsford.—Suppose the Court had done something beyond its power, would that prevent the operation of the rule?

Mr. Attorney General.—I should apprehend not, certainly, unless the two things were so inseparable, that it could not apply that which it had done within the power, without mixing it up with that which it had done beyond. But what I take the liberty to submit upon that is, that it is clear upon the faceof the ordering part of the rule that the intention was not to do anything except to extend, apply, and adapt certain provisions specified upon the face of the order of the Common Law Procedure Act.

Lord Chancellor.—You desire us to take the rule with the omission of those words?

Mr. Attorney General.—Substantially, practically, I look upon them as adding nothing to its effect; but I cannot but think if the clauses have been copied *simpliciter* out of the Act of Parliament, leaving in those words which are superfluous or inofficious with reference to the particular subject, but which words do not affect the construction of those which are officious, it is perfectly good with regard to those that are officious; and it is doubtful whether it would not have been proper to have provided that you should take the provisions as you find them, and to have said they shall apply to the Revenue side of the Court of Exchequer, which would be as far as applicable.

Lord Kingsdown.—As if they had enumerated such and such clauses, numbering them, and applying them to the Revenue side of the Court.

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Mr. Attorney General.—Yes.

Lord Wensleydale.—They had no power to fix the Court of Error; they could not have altered the statute as to the Court of Error.

Mr. Attorney General.—Just so. I think the way in which Lord Kingsdown has put it expresses in the neatest way what I mean to convey. If they had simply referred by numbers to the sections, and said those sections shall be applied, the fact that there are in those sections some provisions separate from the rest, *per se* inapplicable, would not prevent their operation in those points in which they were applicable.

Lord Chancellor.—You will consider that again, perhaps, in a future stage of your argument, for it is material to see whether the 36th section is a provision capable of being transferred and applied.

Mr. Attorney General.—I think I shall have no difficulty about that.

Lord St. Leonards.—If they had said that all those sections should, as far as applicable, apply to the Revenue side of the Court of Exchequer, that would no doubt have been a proper mode of legislating. This is not saying that so far as may be applicable to the Revenue side they shall be applied, but it is a positive applying to the Revenue side of the Court of Exchequer those three Courts as Courts of Appeal from certain orders.

Mr. Attorney General.—I take the liberty of saying that those words "the Court of Error" cannot, in the order made applicable to the Court of Exchequer, have any meaning, except the Court of Exchequer Chamber. They can have no other meaning. The words "the Court of Error" do not occur in the Act of Parliament in a sense which defines them as having any other meaning, except with respect to particular local Courts, with which we have nothing to do. The Act says for the purpose of appeals from those courts the Queen's Bench shall be the Court of Error. It does not say the Court of Queen's Bench is to be the Court of Error generally, or a Court of Error from any Court except Lancaster and Durham; therefore those words "the Court of Error" as used in the Common Law Procedure Act have *per se* no other meaning than that of the proper Court of Error, the proper Court of Error with reference to the Court from which the Error comes, and therefore they add nothing in this case to the operation of the clause, and leave it exactly as it would have been if those words had been omitted. They do not injure it; but the words the Court of Error *per se* in the Act of 1852 do not point to any Court whatever in particular; they point to the proper Court to which Errors should be taken, from the Court from which the Error comes; and therefore where you are dealing with the Court of Exchequer from which the Error goes to the Exchequer Chamber, the words "the Court of Error" added to the words "Exchequer Chamber and House of Lords" neither injure nor improve the operation of the rule;

they do no harm though they do no good. There they are, but they do not injure the operation; they point to nothing which it was beyond the power of the Court of Exchequer to do.

Lord St. Leonards.—I do not quite follow you. In the words as originally introduced into the Act of 1854, every word had its proper application to the Act of Parliament, and its construction admitted of no difficulty whatever. The Barons under the authority they have, take the clause as they find it, and make it a substantive clause.—Suppose they had power to do that, then I see the sense in which they use the words. Can they use those words they have thus taken from the Act of 1854 in a different sense from that in which those words were introduced in that very Act?

Mr. Attorney General.—I say that they do not use them in a different sense.

Lord St. Leonards.—Do you mean the very same words in the original Act, which are borrowed by the subsequent Act, admit of two different interpretations in the two Acts?

Mr. Attorney General.—No. I say they do not use them in a different sense; the words mean the proper Court of Error, and do not mean any particular Court. They mean the proper Court of Error, having regard to the Court from which the error comes.

Lord St. Leonards.—What do the words mean in the subsequent Act?

Mr. Attorney General.—Exactly the same, namely the Court of Exchequer Chamber. In the Act of 1854 they mean the proper Court of Error, be it what it may; and as that might be in some cases different from the Exchequer Chamber, those words are added *ex abundanti* to meet that case.

Lord Chancellor.—We understand your argument perfectly.

Mr. Attorney General.—Not as pointing to a distinct Court in that place?

Lord Chancellor.—We understand what you mean.

Mr. Attorney General.—Whatever the Court may be, the Exchequer Chamber is mentioned, and the House of Lords is mentioned. Where the Exchequer Chamber happens to be the Court of Error the words are superfluous; where there is any other Court which is the Court of Error, not the Exchequer Chamber, the words are officious; and for that reason they are put in; they do no hurt; they are general, and you are to apply the words *reddendo singula singulis* according to the Court with which you have to deal; and where you have to deal with a Court from which Error lies to the Exchequer Chamber, then those words point to the Exchequer Chamber, though that Court is afterwards expressly mentioned. If you had to deal with a Court from which Error would lie to any other Court, then those words would point to that other Court. It is just exactly the same thing as if it had said, "The Court of Error, namely the "Exchequer Chamber;" or it may be explained thus, "Court of "Error, that is, as to the Superior Courts at Westminster, and

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" certain other Courts, the Court to which Error goes from them, " whatever the Court of Error may be."

Lord St. Leonards.—It is Error from the Revenue side of the Court of Exchequer.

Mr. Attorney General.—Error from the Revenue side of the Court of Exchequer goes to the Exchequer Chamber; we have this point fixed: whenever Error lies from the Revenue side of the Court of Exchequer it goes to the Exchequer Chamber; and where you have that word to guide you, " Court of Error," that as applied to the Court of Exchequer, whether Revenue or Plea side, means necessarily the Exchequer Chamber; and the only question we have to deal with here is, whether there is power to extend the provisions as to appeals, which, if they are extended, are to go to the Court of Error, namely, the same Court to which error would go.

Lord Wensleydale.—If they had left the comma out there would have been no difficulty.

Mr. Attorney General.—It is necessary that I should bring under your Lordships' notice the particular provisions of the Queen's Remembrancer's Act, but I am not quite sure that it would not perhaps be more convenient for me to do that in connection with that portion of the argument, which relates to the conclusions drawn from those particular provisions. Those parts of the argument that arise upon the language of the 26th section of the Queen's Remembrancer's Act, as it stands, perhaps may be conveniently proceeded with in the first instance, and then we shall see afterwards, whether we have anything else in the Act of Parliament which modify their effect. In the first place I put to your Lordships the case in this way. Supposing that the Legislature itself had said, that all the provisions of the Common Law Procedure Act, 1854, shall be applied to the Revenue side of the Court of Exchequer, can there be a doubt that those particular provisions with which we are dealing would have been so applied. If the Legislature had said "all the provisions of the " Common Law Procedure Act, 1854," or if it had said, " the " provisions with respect to appeal," can there be a doubt that the words would have been sensible and that you would have known how to interpret them? Then, when the Legislature has said " it shall be lawful for the Chief Baron and two or more Barons, " from time to time, by any rule or order, to extend, apply, or " adapt any of the provisions of the Common Law Procedure Act " of 1854 to the Revenue side of the said Court," is there the slightest difficulty in interpreting that in the same way in which you would have interpreted enacting words to the same effect in the same terms contained in an Act of Parliament? Why should empowering words and enacting words receive a different construction? The words, " to the Revenue side of the said Court," if they had been in an enacting clause, would have immediately been seen to be applicable to all the causes depending upon the Revenue side of the Court; and when you find in the

Common Law Procedure Act, 1854, a series of provisions giving in particular cases the power of appeal, those provisions would have been as easily applied to causes depending upon the Revenue side of the Court as any other provisions in the Act. I think, therefore, my Lords, it would be departing from the natural and proper meaning of words, to say, that a different intention is to be understood when the same words are used in an empowering clause, from that which would have been understood if the words had been used in an enacting clause. The sole question is, whether the provisions are capable of being so applied; whether, if you do apply the clauses, the thing is intelligible upon this language; whether they are capable of being applied to the Revenue side of the Court with reference to causes depending upon that side of the Court in all their stages? Let us for a moment consider the general policy of the statute. That is pointed at by the Chief Justice Erle, in his judgment, and I think attention to that general policy will lead you to a conclusion that it is not in any degree whatever probable (unless the words compel you to come to that conclusion) that it was meant to limit the power so as to prevent the application of this very useful and salutary provision with which we are now dealing. At page 181 of his judgment, he says, "This brings me to the passing of the statute "above mentioned, the 22nd and 23rd of Victoria, chapter 21, under "which the Barons claimed to make this order. I assume that the "procedure on the Revenue side of the Exchequer was adapted to "usages now obsolete, and so was in need of being amended; also "that the Legislature intended to adopt this amended procedure "of the Common Law Procedure Acts, as being consonant to the "interests of truth and justice, reserving no privileges to the "Crown as a suitor against a subject inconsistent with those "interests." Let us dwell for a moment on the idea conveyed in those words. With great pains the Legislature had been occupied in the work of reforming the general procedure of the Courts of Common Law, including procedure by way of error and appeal. In those Common Law Procedure Acts, a system had been elaborated which was a very great improvement in the administration of justice, they simplified and amended the procedure, from which the suitors and the subjects derived great benefit. *Primâ facie*, it might be presumed, that it would be desirable that those benefits should be extended, as far as, having regard to the different nature of the subject, they could be, to suits also between the Crown and the subject, to Revenue suits as well as to other suits; and is therefore probable that the same motives and the same considerations which led to the enactment, as far as the Plea side was concerned, would lead to the adoption of that enactment, or to giving power for the adoption of that enactment as far as it could be usefully applied in Revenue cases also. Therefore, as far as mere antecedent probability goes, it appears to me that the general policy of all the statutes leads in the direction of that conclusion. Then

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we find in those general words power given. But it is said, "That is for the purpose of making the process, "practice, and mode of pleading on the Revenue side of the "Court as nearly as may be uniform with the process, practice, "and mode of pleading on the Plea side of the Court;" and, therefore, though perhaps the words, "extend, apply, or adapt any of "the provisions of the Common Law Procedure Act of 1854, to "the Revenue side of the Court," standing by themselves, would have extended to those provisions, yet, it is said, it is only to be done for the purpose of making the process, practice, and mode of pleading of that side as nearly as may be uniform with that upon the other side, and that reduces you, we are told, to the limits of the process, practice, and mode of pleading.

Now, let us for a moment, taking the narrowest view of it, consider, whether the object of assimilating, as far as possible, the process, practice, and mode of pleading on the Revenue side of the Court would be capable of being attained, if you were to leave out everything which relates to error and to appeal; and for this purpose, I couple error with appeal, the two things are *ejusdem generis*, as I will afterwards show; if you leave out what takes place outside the four walls of the Court of Exchequer itself, in the process of error or in the process of appeal for the purpose of correcting its judgment and returning the corrected record, is it possible to say that you do not, by such an omission, defeat the object of making the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with that on the Plea side? It is obvious that the same proceedings have quite a different effect, and quite a different meaning if they are appealable, or if they are not appealable. In cases of appeal, as I will show, when I come in detail to the provisions, a very considerable portion of the procedure takes place within the walls of the Court of Exchequer itself, in the Court from which the appeal is brought; all the preliminary proceedings are there, and therefore as far as that part of the process, practice, and mode of pleading is concerned, it is strictly that of the Court itself; and you omit all that; you omit the power of the correction of its judgments, you omit that which determines the character of its ultimate judgments, and secures their being in accordance with the law. All those differences you insist upon, if you do not admit the process of assimilation to go on with reference to anything which is not, strictly speaking, confined within the four walls of the Court itself, though it be a matter which arises in the progress of a cause on the Revenue side of the Court, and is necessary to a final and just determination of that cause. Therefore, if you look at the object, it appears to me that the object points to the same conclusion that the general words do. Assimilation is defeated, and defeated on cardinal points, points of the utmost importance to the administration of justice; and differences of equal importance are caused unnecessarily to remain, if you limit the power in such a way as the argument on the other side supposes.

Let me for a moment dwell upon those words "process, practice, "and mode of pleading," themselves. "Practice," as Mr. Justice Willes observes, is a word of the largest signification; and according to its popular and professional usage is always treated as comprehending the mode of correcting errors in the judgments of the Courts, which draws after it the procedure by way of appeal, and in the familiar treatises and books upon the subject it is shown to have that sense. But with regard even to "process," my Lords, the word process in those early Acts of Parliament, which I referred your Lordships to with reference to errors from the Court of Exchequer, is used in a way which shows that the whole of the procedure on the record is meant by it; and Lord Coke, in Blackamoor's case, 8th Coke, page 157 B, says this—that case arose upon the interpretation of the statute for the amendment of clerical errors in proceedings; Lord Coke says this—"It is to be known that this word "'process,' which is the only word in this statute which is "to be amended, is taken in law in two significations—in one "largely, and in the other strictly; and in the larger sense, "it is taken for all the proceedings in all real and personal "actions, and in all Criminal and Common Pleas, *et processus* "*derivatur a procedendo ab originali usque ad finem.*" That appears to me, my Lords, to be the sense in which the word, at all events as interpreted in connection with its context, is used in the whole of these Acts. It is intended to comprehend the entire judicial process from the beginning to the end; and Lord Coke goes on, "And in this sense it "is taken in the Register Original 128 a. in the writ *De* "*continuando processum post mortem capitalis Justic'* in a "writ of Oyer and Terminer, within which words (*processus*) as "it there appears is included not only the judicial process, but "also the commissions, indictments, rolls, *et alia memoranda;* "and *in alio sensu*, this word (*processus*) is taken more strictly, "sc. for the proceedings after the original upon the plea-roll "before judgment."

Lord Chancellor.—In the larger sense would not "process" include pleading and practice; and if it be united with pleading and practice does not that show that it is used in a more limited sense.

Mr. Attorney General.—In the larger sense it would include what are called the pleadings, as distinct perhaps from the rules and laws of pleading.

Lord Chancellor.—In your large sense this very thing is part of the process of the Revenue side of the Court of Exchequer?

Mr. Attorney General.—No, I think not. That which is part of the process of the Revenue side of the Court is the step which is necessary to be taken in order to carry an error for correction to the proper Court of Appeal; and the moment it acquires its appealable quality, the statute of course goes on to say what is to be done by the Courts of Appeal in dealing with it. The initiatory steps by way of appeal are taken before it leaves that

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Court, and while it is still there, it has acquired that character; and those steps being taken while it is still in that Court, they all belong to the process of the Court, as does that which is to take place in the Court when it returns after the error has been corrected. Then the statute steps in, and tells us by its enactments how that gap is to be filled up, and what are the Courts which, in the exercise of their appellate jurisdiction, are to deal with the case for the purpose of correcting this error. The record is one from beginning to end. It is a record of the Court of Exchequer during the whole period, and even while it is here. What your Lordships are doing of course is not done in the Court of Exchequer, but your Lordships are dealing with the record of the Court of Exchequer, and with a process of the Court of Exchequer, because that record is the *processus* of that Court, and that processus is subject to correction by your Lordships, and being corrected will be returned into the Court of Exchequer, that execution may follow. I am using here, of course, language which in the first instance is appropriate to proceedings in Error.

Lord Chelmsford.—Have not the words "process, practice, "and mode of pleading" in modern times acquired a meaning distinct from each other?

Mr. Attorney General.—I think it is quite possible to apply to each a distinct meaning. "Process," for instance, in its lower sense, as mentioned by Comyn (referred to by Mr. Justice Willes), would apply to writs, and the like. The word "practice" is a perfectly general word, and, as the same learned judge observes, comprehends the whole course of procedure in the Court in all its proceedings. The word "pleading," we all know, signifies a particular portion of that practice. Those words, united as a whole, were selected by the Legislature as best calculated to express the entire subject, with which each of them is partially conversant.

Lord St. Leonards.—You argue that the word "process," followed by the other words, is as powerfully operative as if it stood alone.

Mr. Attorney General.—I do not think it necessary to argue that the word "process" is as powerfully operative as it would have been if it had stood alone; but I think that the word "process" if taken alone, being large enough to include the entire subject of procedure, and the word "practice" if taken alone, being large enough to include the whole of that field of procedure, and the laws and rules which regulate pleading being superadded, one may collect from the use of such large and general expressions an intention on the part of the Legislature to comprehend in the fullest and most absolute way all that those words convey.

Lord St. Leonards.—Do you say those words are equal to each other?

Mr. Attorney General.—No; I think that they are distinguished. In Coke the word "process" is not used as equivalent

to "practice," because "practice" will comprehend a great deal that is not in the processus. The processus is described by him as the proceeding in the action, all the steps taken in the action from its beginning to its end; the practice of the Court comprehends the rules of the Court which lay down the laws under which practitioners are to act; and "pleading" comprehends the rules and laws of pleading, as well as the actual documents which result from the application of those rules. Taking "process" in the large sense in which Lord Coke uses it, there is a distinction between the process which is the process in the particular action, and the practice of the Court which is the general practice and rule and system of procedure.

Lord Chancellor.—Perhaps the best definition of your argument would be that "process" means everything appearing upon the form of the record, and that by the Common Law Procedure Act the steps in error do appear upon the record.

Mr. Attorney General.—That is what I mean. The word "practice" goes much beyond that which appears upon the record; and the word "pleading" comprehends the methods, rules, and laws of pleading, as well as the separate acts of pleading themselves. It is not at all difficult, while giving to each word its full and large signification, to show what the distinctions are between them, and the Legislature has used them as a matter of fact so as to show that it intends to comprehend the whole subject matter.

Lord St. Leonards.—What do you say "practice" is? Does it include "appeal," or does "procedure." Which of the two words includes "appeal?"

Mr. Attorney General.—The word "procedure" is not the word that is in the Act; "process is the word."

Lord St. Leonards.—I mean "process."

Mr. Attorney General.—If the word "procedure" had been in the Act, I apprehend that it would have been a larger word than "process."

Lord St. Leonards.—Take the words as they are.

Mr. Attorney General.—The whole expression is meant to comprehend procedure of every kind necessary to the determination of a cause from the beginning to the end.

Lord St. Leonards.—Take the words as you find them. Which do you say includes appeal?

Mr. Attorney General.—I say that both "process" and "practice" include in part "appeal." "Practice" would include the rules laid down concerning appeals, and the methods of bringing them; and "process" would include the actual process of appeal by which the appeal is initiated and put in motion; and both those things operate in the Court below under those Acts of Parliament, because your Lordships will find, that, whether we take error under those Acts, or whether we take appeal, much has to be done in the Court below before it passes into the Court by which the error is to be corrected. Take the very sections with which we are dealing to illustrate that. Your Lordships

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recollect that the sections about error in the Common Law Procedure Act tell one, at very great length, the different steps to be taken in the Court below, and expressly say that procedure to error is to be a step in the cause.

Lord Chancellor.—Upon this particular point what do you consider was the object of the Legislature in saying that "the "proceeding to Error shall be a step in the cause?"

Mr. Attorney General.—A very important object. It was to prevent that sort of separation between the proceeding in Error and the original proceeding which existed before, when you had a new writ of error which had to be issued. The step by which you got into the Court of Error was now to be taken as a step in the cause itself, and in the Court from which the error was brought, so as to connect the proceeding in Error with the original proceeding.

Lord Chancellor.—If there is any irregularity in the proceedings, and a party takes a step in the cause, he waives the irregularity; and it may, therefore, have been the object to prevent the party taking advantage of any previous irregularity which was capable of being waived. The writ of error created a supplementary record. Perhaps the intent was to let it be a proceeding in the cause *continuando*, as it were, without the creation of a supplementary record.

Mr. Attorney General.—That, I submit, was the intention. At all events the effect clearly is this, and it is most important. The step by which you get into the Court of Error is taken in the original Court, and is taken as a step in the cause by Act of Parliament; and then when the case comes into the original Court it comes in in that way, by a step taken in the cause, and taken in the original Court, which necessarily therefore so far belongs, in the very narrowest sense, to the process and to the practice of the original Court itself. Those are the provisions as to Error. And perhaps, my Lords, I might be pardoned for once more referring to the Common Law Procedure Act, to which I referred before, in order that that proposition may be made more plain. The clauses as to Error to which I called your Lordships attention in the Common Law Procedure Act, 1852, were those which began with section 146. Let us go back and see what it is that is to be done in the Court below. The 148th section is that which says that the "proceeding to Error shall be a step in the cause, "and shall be taken in manner herein-after mentioned." What is the manner? The next clause, the 149th, says this: "Either "party alleging error in law may deliver to one of the Masters "of the Court a memorandum in writing in the form contained "in the Schedule A to this Act annexed, marked No. 10, or to the "like effect entitled in the Court and cause, and signed by the "party or his attorney, alleging that there is error in law in "the record and proceedings; whereupon the Master shall file "such memorandum, and deliver to the party lodging the same "a note of the receipt thereof; and a copy of such note, together "with a statement of the grounds of error intended to be argued,

" may be served on the opposite party or his attorney." Then the next section provides that execution shall be superseded by proceedings in Error, unless in particular cases. Then the next, the 151st section, is, that bail may be given in error, and that is to be a proceeding in the Court below, taken before a judge of that Court. Then the 152nd section provides, that " the assign- " ment of and joinder in error in law shall not be necessary or " used, and instead thereof a suggestion to the effect that error " is alleged by the one party, and denied by the other, may be " entered on the judgment roll in the form contained in the " schedule." Then the 153rd section says, " The roll shall be " made up, and the suggestion last aforesaid entered by the plain- " tiff in error within ten days after the service of the note of the receipt of the memorandum alleging error, or within such time as the Court or a Judge may order, and in default," and so on. Then by the next section, " In case error be brought upon a judgment " given against several persons," there is provision for that case The 155th section goes on to say, " Upon such suggestion of " error alleged and denied being entered, the cause may be set " down for argument in the Court of Error in the manner here- " tofore used." And then follows the section which I read before to your Lordships about the way in which the Court of Error is to proceed. So that the whole of the proceedings down to the setting down of the cause for argument in the Court of Error are proceedings which take place in the Court below. They are entitled in that Court and in the cause.

Lord Cranworth.—They are in fact pleadings in the cause.

Mr. Attorney General.—Yes; and to that extent, at all events, the proceedings which initiate the error are in every sense part of the process, practice, and mode of pleading of that Court. And then the Legislature goes on to say what is to follow from that which has taken place in the Court, namely, that the Court of Appeal being duly constituted is to hear and determine. Let us see if the case is the same as to appeal. I say it is; that those sections of the Act of 1854 proceed upon a similar principle, though the words "a step in the cause" are not found there. The first and most important of them is the 35th: " In all cases of motions for a new trial upon the " ground that the judge has not ruled according to law, if " the rule to show cause be refused, or if granted, be then dis- " charged or made absolute, the party decided against may " appeal, provided any one of the judges dissent from the rule " being refused, or, when granted, being discharged or made " absolute, as the case may be, or provided the Court in its " discretion think fit that an appeal should be allowed; provided " that where the application for a new trial is upon matter of " discretion only, as on the ground that the verdict was against " the weight of evidence or otherwise, no such appeal shall be " allowed." A right to appeal attaches under that clause wherever it applies, while the cause is still in the Court below, and in some cases attaches upon the exercise of the discretion

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of the Court below itself,—"provided that the Court, in its "discretion, think fit that an appeal should be allowed." Then what is to be done? We pass over the 36th section, which mentions what the Court of Appeal is to be, namely, that it is to be the Court of Error; and then the 37th section says this: "No appeal shall be allowed unless notice thereof be given in "writing to the opposite party or his attorney, and to one of "the Masters of the Court, within four days after the decision "complained of, or such further time as may be allowed by the "Court" (that is the Court of Exchequer) "or a Judge." Then the next section says that notice of appeal shall be a stay of execution, just as in the case of error. The 39th section says: "The appeal herein-before mentioned shall be upon a case to be "stated by the parties (and in case of difference to be settled "by the Court, or a Judge of the Court in the Court appealed "from" (that is to be done in the Court appealed from) "in "which case shall be set forth so much of the pleadings, "evidence, and the ruling or judgment objected to, as may "be necessary, to raise the question for the decision of the "Court of Appeal." Then the next section relates to the Court of Appeal. So does 41. So does 42. So does 43. 45 relates to affidavits, which I do not think we need trouble ourselves with. So that your Lordships see that the clause which gives the right of appeal, and says when it is to attach, operates in cases to which it applies, while the case is still in the Court below. The clause which says how the appeal is to be brought, and upon what case, provides that that case is to be stated by the parties, and if the parties differ, it is to be settled by the Court or a Judge of the Court appealed from. And notice of appeal is to be given to one of the Masters of the Court appealed from, within such time as may be allowed by that Court or by a Judge, and in the meantime execution in that Court is to be stayed by the notice of appeal. Therefore the analogy of the procedure in Error is followed throughout. All the initiatory steps which introduce and usher the appeal into the Court of Appeal are to be taken in the Court from which the appeal is brought; they constitute a part of the process, practice, and procedure in that Court.

Now, my Lords, your Lordships will find that the learned Judges who agreed with us, the Judges of the Court of Common Pleas, attributed considerable importance to this view of the case, if your Lordships will permit me to refer to some of the passages in their judgments. I will take, first of all, the judgment of Lord Chief Justice Erle, at page 182 in the Appendix.* He says, between A and B, "And first I would premise that procedure "in a suit includes the whole course of practice, from the issuing "of the first process by which the suitors are brought before the "Court to the execution of the last process on the final judg-"ment; and throughout the Common Law Procedure Acts, and

* *Vide* page 76 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

" this Act 'procedure' is used as equivalent to 'process, prac-
" 'tice, and mode of pleading.' Procedure in civil suits in the
" Superior Courts of Common Law received memorable improve-
" ment by the Common Law Procedure Acts, 1852 and 1854.
" Those Acts are declared in the preamble of the first and the
" title of the second to be for the amendment of the process, prac-
" tice, and mode of pleading in the Superior Courts. Those
" Acts provide that each suit, from the issuing of the first to the
" execution of the last process, should be taken to be one entirety.
" They contain provisions for the practice to be followed in
" obtaining redress for erroneous judgments by appeal to the
" Exchequer Chamber and the House of Lords, the writ of
" error being abolished, and proceedings in error being declared
" to be steps in the cause by the Common Law Procedure Act,
" 1852, section 148. Appeal is very essential for maintaining
" the right administration of law, and careful provisions are
" made to give the use and prevent the abuse of the right of
" appeal. According to those provisions the appeal is effected
" by the act of the suitor in the Court of First Instance
" delivering a memorandum to the officer of the Court with-
" out writ or other authority, and the right to deliver that
" memorandum is vested in him in his capacity of suitor
" derived from the first process in the suit. That memorandum
" so delivered, if the rules of practice are complied with, com-
" pels the officer of the Court below to bring the record into
" this Court and into the House of Lords, and may compel
" each of those higher Courts to hear his appeal against the
" judgment entered on the roll of the Court below, so brought
" by that officer into the higher Courts; and he is to record
" thereon the judgment of those higher Courts, and then to take
" back that judgment to the Court below, as the judgment in
" that suit to be executed by that Court, according to the
" practice thereof. The provisions are ample for the practical
" guidance of the suitor in carrying his appeal through each Court,
" and they are clear to show that each Court of Appeal has no
" other functions than to fix the time for hearing the case;
" neither Court can interfere with the record, or do any effective
" act, but hear and determine on the judgment to be pronounced.
" The whole of these provisions in the Common Law Procedure
" Acts are constantly described as relating to 'process, practice,
" 'and mode of pleading,' and they extended to the Plea side
" of the Court of Exchequer, but not to the Revenue side of
" that Court."

Mr. Justice Willes, at page 175,* says at letter I, "If the
" enactment be 'to extend, apply, and adapt such of the
" 'provisions of the Common Law Procedure Act of 1854,'
" which is the Act with which we are dealing, as proper for
" 'making the process, practice, and mode of pleading on the
" 'Revenue side of the said Court as nearly as may be uniform
" 'with the practice, process, and mode of pleading on the Plea
" 'side of such Court,' to deal with such an enactment, all you

* *Vide* page 67 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

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" have to do is to ascertain whether the process, practice, and " mode of pleading on the Revenue side of the Court do include " proceedings by way of appeal on that side of the Court. I " own that upon the best consideration which I can give to " the matter, I am of opinion that they do, not only from " one's experience with respect to the practice of the Court, " which has always been considered to include error and now " appeal, but also upon the terms and out of the enactments of " this Act itself. First of all, with regard to the experience of " us all, with respect to practice, for of course the mode of " pleading is out of the question, and I pass over process, be- " cause it has a technical meaning, such as has been put upon " it in Comyn's Digest, title 'Process.' It relates to writs, " either original or judicial, writs of mesne process, or writs of " execution; and I therefore do not place any reliance upon the " use of the word 'process;' but coming to 'practice,'—'practice' is " not a term of art. 'Practice' is a word applying to all the pro- " ceedings by which a cause is brought to judgment and execution; " and it is impossible to dispose of the subject of the practice of " the Court, without disposing of all the steps which may be " taken before the judgment of the Court is carried into execu- " tion. And accordingly, looking at the question as a popular " or as a professional one, if I take up any of the recognized " books of practice of these Courts, I find that one of the " heads in such a work will be the head of 'Error.' Error will " be considered, and now, since the recent alterations, Appeal " will be considered; otherwise such a work would be, as it " were, maimed of an arm or leg. A member of the practice of " the Court, is the proceeding by which the judgment of the " Court may be stayed, and the execution of the Court put off " until it is determined whether the judgment pronounced by " the Court is right or not. The understanding to be gathered " from works with respect to practice is this, that a proceeding " by way of error or appeal is part of the practice on the side " of the Court in which the process originates. I think it ne- " cessarily must be so now, because we are all aware that, as a " rule, no Court possesses any jurisdiction over the subjects of " the Queen, without the writ of the Queen. Neither this " Court, nor the Court of Exchequer, has any power to proceed, " unless upon the express authority of an Act of Parliament, " without the process of the Queen; and accordingly the juris- " diction of Courts of Error, before which appeals were formerly " brought exclusively, was initiated by the Queen's writ of " error out of Chancery. That is abolished, and the only pro- " cess under which the Court acts now, from the beginning " to the end of any proceeding, is a process which is sued out " in the Court of First Instance, the execution or the stay of " execution of which process is the object, of course, of every pro- " ceeding in error in any cause. In modern times, an appeal " has been substituted, as being found more convenient than a " writ of error. The appeal takes the place of the writ of error, " and indeed more peculiarly appeal is a proceeding in the Court

" below, upon whichever side the process is commenced. There " is no record in the Court of Appeal;—the appeal is a mere in- " formation, without any formal process to the Court which is " substituted for the first Court, of what has taken place there, " with a view to have a decision without being hampered by " the technical forms which affected the proceeding in Error. " So much with respect to the meaning of the word 'practice,' " as understood in the profession." And then he goes on to observe that it has the same meaning as used in these Acts of Parliament. There is an observation which appears to me to be of great force, which is made by Mr. Justice Willes, and which I connect with this branch of the subject, namely, what he says of the proceedings at Nisi Prius. If we are to put upon this clause in the Act of Parliament so narrow a construction as is contended for upon the other side, and to say that the power given by it does not extend to anything which is not in the truest and most literal sense, process, practice, or pleading, or pleading to be begun and terminated in every respect within the limits of the Court itself, how can that include what is done at Nisi Prius? Now your Lordships will observe what is said upon that subject by Mr. Justice Willes a little later than the passage which I read. He says there, at letter I,* " In truth appeal was not an " extension of jurisdiction, but only the substitution of a more " convenient mode of obtaining the opinion of a superior Court. " And unless the Legislature is to be considered as having stulti- " fied itself in the first Common Law Procedure Act, by reciting " an improvement in the practice of the Courts, and then pro- " ceeding to make various enactments with respect to Error, not " only affecting the Courts of First Instance, but affecting the " Courts of Error also, and touching even the powers and juris- " diction of the House of Lords, I am at a loss to see why " 'practice' in the 26th section should not be construed to " extend to the mode of taking the opinion of the Court of " Error on appeal, before the execution issues from the Court in " which the proceedings commenced. And I apprehend that " that is quite as much a part of the practice of the Court of " First Instance as is, in the case of these Revenue proceedings, the " trial of the issues arising on a record out of the Court of " Exchequer in the Court of Nisi Prius at the assizes, which we " all know is a Court whose jurisdiction is created in as different " a manner, and is in itself in every way as distinct from the " Court at Westminster as is the Court of Exchequer Chamber or " the Court of Appeal." That is a consideration well worth pausing upon. It is perfectly true that the trial at Nisi Prius is not a trial by the Court of Exchequer, or in the Court of Exchequer. It is a trial by Judges acting under the Queen's Commission. By the Act of Parliament of Edward I. originally,—as to cases from the Queen's Bench and Common Pleas, the power was given of trying causes which came from those Courts under those commissions. Then by the Act which I referred to, the 2nd and 3rd of Victoria, the like power was extended to causes on the Plea

* *Vide* page 68 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

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side of the Court of Exchequer, without a commission from that Court; and lastly, by a clause in the Queen's Remembrancer's Act, the same power is created with regard to cases on the Revenue side, without any action of the Court of Exchequer itself. And therefore we now have cases on the Revenue side of the Court of Exchequer, on the same footing as cases on the Plea side, and as cases from the Common Pleas and the Queen's Bench. With regard to trials at Nisi Prius, they are to be tried under the Statute, and without the action of the Court itself causing those trials to take place, and when the trial takes place, it is not only not in the Court of Exchequer, or before the Court of Exchequer, but it may take place before Judges, who belong to one of the other two Courts.

Lord St. Leonards.—All which is by express enactment?

Mr. Attorney General.—Yes, it is so; but I ask your Lordships to bear that in mind, when we come to consider what is the construction to be placed upon this 26th section of the Queen's Remembrancer's Act, and to see whether or not the powers given by that 26th section are to be so read as to exclude the power of adapting to the Revenue side of the Exchequer any of the provisions of the Common Law Procedure Act of 1852, which relate to jury trials at Assizes, because if you cannot construe those words "to extend, apply, or adapt any of "the provisions of the Common Law Procedure Act, 1852, as may "seem to them expedient for making the process, practice, and "mode of pleading on the Revenue side of the Court as nearly as "may be uniform with the process, practice, and mode of pleading "on the Plea side of the Court," as applying to any of the provisions of the Common Law Procedure Act of 1852 which do not relate to that which is to be done within the walls of the Court of Exchequer itself, then you exclude the power of extending to Revenue cases the provisions with respect to jury trials at the Assizes, as much as you exclude the power of applying those provisions as to Error or Appeal.

Lord St. Leonards.—I thought that as to jury trials, the Acts expressly gave the power?

Mr. Attorney General.—No; the Queen's Remembrancer's Act legislates to a certain extent, and stops there.

Lord St. Leonards.—Section 17 seems to provide for it?

Mr. Attorney General.—Section 17 simply says that the trial shall take place without a special commission. It extends to the Revenue side of the Court of Exchequer, that which had been done by the 2nd and 3rd of the Queen as to the Plea side.

Lord St. Leonards.—Parliament did not leave that to come within section 26; they themselves provide expressly for it.

Mr. Attorney General.—That particular thing was provided for by the 17th section, but all the machinery to be applied was left open.

Lord St. Leonards.—I understand you to be arguing that the 26th section would enable the Barons to give this power?

Mr. Attorney General.—No, my Lord, I did not mean that

section 26 would enable them to do what was already done, but what I meant was this: section 26 enabled them to adopt all the provisions of all the Common Law Procedure Acts which relate to jury trials at the Assizes; the clause your Lordship refers to is not a clause of the Common Law Procedure Act; it is a thing that applies to the Revenue side of the Court of Exchequer that which had been done as to the Plea side by the 2nd and 3rd Victoria, which I have already read.

Lord St. Leonards.—The 17th section expressly provides what shall be done with respect to Nisi Prius, that after the passing of the Act the Justices were "empowered to try suits and "proceedings pending on the Revenue side of the Exchequer, "and to proceed thereon in like manner as they can or may do "in respect of causes pending on the Plea side of the said "Court." I believe those words are exactly words of the 2nd and 3rd Victoria, chap. 22., which extended the Nisi Prius jurisdiction to the Plea side of the Court of Exchequer without a special commission, so that nothing was left to be done by the Barons.

Mr. Attorney General.—That is certainly not the view which the Barons have taken.

Lord St. Leonards.—We are considering whether the view they have taken is right.

Mr. Attorney General.—I was referring to what they had done on a former occasion. It appears to me that very serious questions will arise as to the efficacy of their acts on former occasions if the judgment on this occasion shall be affirmed; that is a consequence that may be unavoidable; but the practice that has been followed upon these acts is a thing at all events upon which your Lordships would wish to be informed in order to consider it in connection with the matter now under consideration. I do not understand this 17th section as having *per se* the effect of introducing all the provisions of the Common Law Procedure Act with respect to trials at Nisi Prius of causes pending on the Plea side of the Court, and it certainly was not so understood by the Court itself. Your Lordship has suggested, and I think with perfect accuracy, that the language there used in the 17th section is adopted from the 2nd and 3rd Victoria, chapter 22; the words there used are "From and after the passing of this Act, it shall "be lawful for all Justices of Assize, and they are hereby autho-"rized and empowered on their respective circuits to try causes "and take inquisitions of pleas pending in the Court of Exche-"quer of pleas which shall be brought before them and to pro-"ceed thereon in like manner as they can or may do in respect "of causes and pleas and pleas pending in the Courts of Queen's "Bench and Common Pleas under and by virtue of the said "Act or by any other law or statute or usage whatsoever, and "that it shall not be necessary hereafter to issue any commission "from the said Court of Exchequer of Pleas for that purpose."

Lord St. Leonards.—The words are verbatim the same, leaving out some unnecessary words.

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Mr. Attorney General.—Yes. Therefore it has clearly no reference in the Act from which it has been taken to the Common Law Procedure Acts, which were afterwards passed; and I apprehend that, according to its true construction, it does not import those provisions of the Common Law Procedure Act.

Lord St. Leonards.—It means, whatever was the law with reference to those proceedings on the Plea side of the Court of Exchequer, it should take effect on the Revenue side of the Court of Exchequer.

Mr. Attorney General.—I beg your Lordships to observe that the 17th section of the Queen's Remembrancer's Act provides that the justices of assize may proceed in like manner as they can or may do in respect of causes pending on the Plea side, but does not *per se* apply and adopt for that purpose all the provisions which are contained in the Common Law Procedure Act with reference to those jury trials.

Lord St. Leonards.—It adopts everything which is the law in reference to proceedings at Nisi Prius upon the Plea side.

Mr. Attorney General.—If that should be the result, then, no doubt, it may very possibly be that the Court of Exchequer in their former orders have done that which is unnecessary, but in their orders which they made under the 26th section in 1860, they certainly considered that, with regard to those jury trials, it was most important to provide ———.

Lord St. Leonards.—We have not those orders before us.

Mr. Attorney General.—But your Lordships will of course take notice of them.

Lord St. Leonards.—We cannot read them unless we have been furnished with them in some way or other.

Mr. Attorney General.—They shall be handed to your Lordships. It is not only on this point that your Lordships' attention will be directed to them.

Lord St. Leonards.—You have stated your joint case by agreement; do they form part of it?

Mr. Attorney General.—Matters of this kind of which Courts take judicial notice, I apprehend, it is not necessary to put into the case.

Lord St. Leonards.—Before you distribute them, we should decide whether we are entitled to receive them.

Mr. Attorney General.—I should not apprehend that any doubt could be entertained upon that subject; these are rules of Court; they may or not be *ultra vires.*

Lord Chancellor.—The only use you make of them is in the way of argument, to show the construction that was put upon this provision by the Barons of the Court of Exchequer in the year 1860.

Mr. Attorney General.—Exactly, my Lord. The rules that I am referring to are rules made in the year 1860 by the Barons; and of those rules, some part relate to proceedings in error, and some to proceedings in jury trials.

Sir Hugh Cairns.—They were referred to in the Court below;

there are true copies of them. It would have been too cumbrous to print them in the Appendix.

Lord St. Leonards.—If they are intended to be used as part of the evidence, they should be in the Appendix.

Lord Chancellor.—You merely use them as an argumentative illustration.

Mr. Attorney General.—To show how this has been acted upon in practice hitherto upon a subject more or less *in pari materia*. On page 11 of the print your Lordships will find, that the 75th rule of that date, 1860, is this:* "That sections 104 to 115, "both inclusive," (those are as to jury trials,) "of the Common "Law Procedure Act, 1852, together with the Rules 44 to 49, "both inclusive, of Hilary Term 1853, where applicable, shall "extend and be adapted and applied to suits on the Revenue "side of the Court." And perhaps, whilst I am upon these rules, I may as well notice the other rules referred to in the Court below. At page 13* your Lordships will find, Proceedings in Error, 97 to 105 inclusive, those are rules made under the same power to regulate the proceedings in error. Your Lordships will find the mode of delivering to the Queen's Remembrancer a memorandum in writing in a certain form is provided for by the 97th section, which is the first step to be taken in error on the Revenue side. Then the 98th rule is: "Upon "any judgment hereafter to be given for the Crown on the "Revenue side of the Court in any suit including intrusion, "except on special verdict, special case, or bill of exceptions, "execution shall not be stayed or delayed by proceedings in "error or *supersedeas* thereupon without the special order of the "Court," and then certain security is to be given. Then the 99th Rule is: "The assignment of and joinder in error in law shall "not be necessary or used, and instead thereof a suggestion to the "effect that error is alleged by the one party, and denied by the "other, may be entered on the judgment roll in the form con-"tained in the schedule to these rules annexed, or to the like "effect." Then Rule 100 is: "The roll shall be made up, and the "suggestion last aforesaid entered by the plaintiff in error "within ten days after the service of the note of the receipt of "the memorandum alleging error, or within such other time as "the Court or a Judge may order, and in default of such sugges-"tion the defendant in error shall be at liberty to sign judg-"ment of *non pros.*" Then 101 is: "The several provisions con-"tained in the 154th, 155th, 156th, and 157th sections of the Com-"mon Law Procedure Act, 1852, where applicable, shall extend "and be applied in like cases on the Revenue side of the Court." I ask your Lordships' attention to that in particular those three sections, 155, 156, and 157, are the sections relating to proceedings in error in the Court of Error, including what may take place in this House. That was a Rule with regard to error exactly similar to the present Rule. We shall afterwards come to consider, whether or no it can be distinguished, upon the construc-

* *Vide* Appendix, p. iii, to report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

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tion of the Queen's Remembrancer's Act; whether itwas authorized or not; and if authorized, whether the principle upon which it is found to be authorized would not equally apply to this case.

Lord Cranworth. —That was upon the notion that it was to be a step in the cause.

Lord St. Leonards. — The House have to decide whether the last orders of the Barons be or not valid orders. In order to show that they are of some authority, you produce other orders made by themselves. Are we to go through and consider the validity of those orders? They are not before the House; and if they are brought forward as an authority, it is an authority of the very tribunal whose Act is now under consideration.

Mr. Attorney General.—Of course; and therefore would not be in any way binding on your Lordships. But, on the other hand, it is often the case that the judgments of the same Judge or tribunal under appeal are referred to, and considered and weighed, the one with the other, before your Lordships determine that that under appeal is bad.

Lord St. Leonards. — I should be sorry to have to weigh and consider that way, and consider all those orders, in order to come to a decision upon the case now before the House.

Mr. Attorney General.—Of course your Lordships will do what you think necessary for the justice of the case; but my impression is, that you will find it useful, when you examine the clauses of the Queen's Remembrancer's Act, to see what the powers are with respect to error, and that it will not be improper to attend to the fact that they have been exercised, and to know how they have been exercised. At least one consideration is deserving of attention, namely, that it is not only in this case, but in other cases depending upon these orders, that the effect of your Lordships' judgment will be felt; which would be an additional reason, as I submit, for anxiously considering the question before you come to that conclusion.

Lord Chancellor.—I think you will observe that none of those orders were made till after the passing of the Queen's Remembrancer's Act in 1859, and therefore they would not, perhaps, be of much value to you.

Mr. Attorney General.—Of course they were founded upon that Act entirely; that is quite clear.

After a short adjournment.

Mr. Attorney General.—Now, my Lords, I think it convenient before making any remarks upon the general argument as to the delegation of power, and the improbability of it, to go to the express provisions of the Queen's Remembrancer's Act (22d and 23d Victoria, chapter 21), upon which particular arguments have been founded. I may state to your Lordships that I think we shall find those arguments answered in the most complete and in the most exhaustive way by Mr. Justice Willes in his judg-

ment at pages 177 and 188 ; and the clauses will be found to deal expressly with four subjects, more or less connected with the present.

First of all, the 10th section gives the parties leave in any case on the Revenue side, "by consent and order of a judge, to state "any question or questions of law in a special case for the opinion "of the Court without pleadings, and upon judgment thereon "error may be brought as on a judgment on a special verdict, "unless the parties agree to the contrary, and the proceedings "for bringing a special case before the Court of Error shall, as "nearly as may be, be the same as in the case of a special "verdict, and the Court of Error shall either affirm the judg- "ment, or give the same judgment as ought to have been given "in the Court in which it was originally decided, the said Court "of Error being required to draw any inferences of fact from the "facts stated in such special case, which the Court below ought "to have drawn." The first remark which I would make upon that section is, occurring as it does in the Queen's Remembrancer's Act itself, that it uses the words "Court of Error" with reference to proceedings on the Revenue side of the Court of Exchequer in a way which would unmistakably fix the sense of those words in any subsequent reference, I mean to the Court of Error, either in the Act itself, or in any order made by virtue of the Act. Then, secondly, the effect of that section is to give an appeal by way of error, in the same way as upon a special verdict, upon a special case stated by consent. And your Lordships will find that that clause embodies two clauses,—the one, section 46 of the Common Law Procedure Act of 1852, and the other, section 32 of the Common Law Procedure Act of 1854,—it embodies and combines them together. Now what is the answer which has been made to the argument founded upon that.

Lord St. Leonards.—Are you speaking of section 10 of the Queen's Remembrancer's Act?

Mr. Attorney General.—I am, my Lord.

Lord St. Leonards.—That section consists partly of section 39 of the Act of 1854, and partly of section 32.

Mr. Attorney General.—Does your Lordship say that it consists of part of section 39? I had overlooked that, if it is so.

Lord St. Leonards.—Yes ; section 39 of the Act of 1854 says, "The appeal herein-before mentioned shall be upon a case to be "stated by the parties."

Mr. Attorney General.—No, my Lord, that is quite a different appeal. Your Lordship is quite under a misapprehension as to that; that relates to a case to be stated after a motion for a new trial. The two sections of which this 10th is composed are the 46th section of the Act of 1852 and the 32nd of the Act of 1854. Section 46 of the Act of 1852 is in these words: "The parties "may after writ issued, and before judgment, by consent and order "of a judge, state any question or questions of law in a special "case for the opinion of the Court without any pleadings." That and section 32 of the Act of 1854 taken together have furnished the materials, and, I think, the words for this 10th section.

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Now, my Lords, it is said, that here you have an example of the Legislature dealing *per directum* with a new kind of error, and introducing *per directum* the provisions of the Common Law Procedure Acts which relate to that particular subject. Upon that Mr. Justice Willes makes, what I think your Lordship will be of opinion, is a very just observation, at page 177.* He had mentioned one case which I have not come to yet; (he did not take them exactly in the order in which they occur in the Act;) and then he says, "With regard to the other cases in which an "appeal might lie under the Common Law Procedure Act, the first "of them is to be found provided for in the 22nd and 23rd of "Victoria, section 10, where I observe that the Attorney General "is included under the general expression of the 'parties.' That "was an appeal upon a special case agreed to between the parties, "including the Attorney General on behalf of the Crown. In "such a case no intervention of the Court was necessary. The "Crown is sufficiently protected by the Attorney General's having "the power of preventing such an appeal by refusing to give his "consent to the special case upon which it might be brought." In other words, Mr. Justice Willes, says—With regard to all those particular cases, I can give a reason why the Legislature should have legislated specially with respect to them, and left all others to the discretion of the Court; and here is the first, that is to say, a special case to take the place of a special verdict dependent on consent in each particular instance. It is not necessary to leave the Court to say whether that is expedient or not, because in no particular case can it be adopted unless both the parties concur in thinking it so, and we can see at once that it is desirable if both parties so agree to allow that form to be adopted instead of the form of a special verdict, for the purpose of raising the same question. Therefore, it is not necessary to remit it to the discretion of the Court of Exchequer to consider whether those provisions of the Common Law Procedure Act should be adopted or not, depending as they do upon consent, and having for their object a proceeding equivalent to a special verdict in another form.

Now, my Lords, we come to the next. The next are the provisions contained in sections 12 to 15 inclusive, and those relate to a new kind of appeal altogether, which no application or extension of the Common Law Procedure Acts would have given, and they rather tend to show the anxiety of the Legislature to give to the subject the benefit of appeal as largely as possible; "In cases of appeal from the assessment of the Commissioners "of Inland Revenue to the Court of Exchequer made under "the provisions of the Succession Duty Act, 1853," (which is a special mode of proceeding dictated by that Act,) "the party "decided against may appeal from the decision of the Court "upon a case to be stated by the parties, or if they differ to be "settled by the Court, or a Judge thereof, or any officer to "whom the Court may think proper to refer the same, and

* *Vide* report of "*Argument in the Exchequer Chamber*," p. 69. (Vol. 3.)

" the Court of Appeal shall give such judgment as ought to " have been given by the Court of Exchequer, and shall " have power to adjudge the payment of costs." Then "such " appeal as aforesaid shall be made to the Court of Error " in the Exchequer Chamber, and the decision of the said " Court of Error shall be subject to appeal to the House of " Lords." It is said upon that, there you see a particular case in which it is expressly said that the Exchequer Chamber and the House of Lords shall entertain an appeal. Yes, because you could not reach it in any other way. That was a subject matter which no application of all or any part of the provisions of the Common Law Procedure Acts would have reached. Therefore, if it was to be done at all, the Legislature must do it themselves, and they did it accordingly. We find that the next clause relates to that; and the 15th clause is similar. "In any " proceeding in the Court of Exchequer by writ of summons " under the Succession Duty Act, 1853, or by rule under any of " the Legacy Duty Acts, the Court may refer the matter to the " proper officer to report thereon, and may, if they deem it " expedient, order the facts contained in such report to be stated " in the form of a special case for the opinion of the Court, and " may give such directions as to the mode of settling the case, " and the matters to be contained therein, and for the production " of such documents, and may direct any issue or issues of fact " to be tried by a jury as they may think proper; and the Court " may proceed to give judgment on such case, and for any amount " of duty the Court are of opinion may be due to the Crown, " and for costs in like manner as on a verdict on information; " and on such judgment error may be brought, and judgment " given, as on a special case stated by consent." That is entirely new. There is nothing like that in the Common Law Procedure Acts, and no possible extension or application of anything contained in those Acts would have reached that case. As Mr. Justice Willes observes, an appeal on error from a rule under the Legacy Duty Acts is quite a new thing; and secondly, the power compulsorily to state a special case is equally new. So that is not the introduction from the Common Law Procedure Acts of some provision there found, from which you can infer that what was not introduced was meant to be excluded; but it is rather an additional instance of the anxiety of the Legislature to give the subject and the Crown the benefit of an appeal in all cases to which an appeal can possibly be applied.

Before we come to the next clause, as to error, some provisions on other subjects are interposed. The 16th section says that the powers of a former Act of William the 4th, with regard to evidence, and certain clauses relating to the same subject in the Common Law Procedure Act of 1854, "are hereby ex- " tended to all suits and proceedings on the Revenue side of the " said Court of Exchequer." Now Lord Chief Justice Cockburn has said, that he is of opinion that other evidence clauses, not mentioned there, are within the powers given by the 26th

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section; and the fact, that some particular clauses relating to evidence have been expressly introduced by the Legislature, does not in the least degree prove that other clauses upon the same subject were not left within the general discretion given to the Court by the 26th section. I rather think, my Lords, for example, that there is a very important Evidence Clause not contained in that enumeration; I mean the 27th clause of the Act of 1854, which relates to the comparison of handwriting. I observe that this 16th section applies expressly certain clauses from 46 to 49 inclusive of the Act of 1854, which are sections, I think, having reference to evidence, to the Revenue side of the Court of Exchequer; it does not apply all the others; and the Lord Chief Justice is of opinion that those which it does not apply may nevertheless be applied. I mentioned one, namely, the 27th, which relates to the comparison of handwriting in the Act of 1854, which, excepting by the act of the Court, would not be applied. My learned friends have said that there is a subsequent clause, the 103rd section, which says that that section is to be applied to all the Courts. I think that probably would only apply to personal actions. I cannot speak with certainty upon that point. Some of the sections, and that is one of them, are made applicable to every Court of Civil Judicature. But we will not enter into an argument upon that, because it is not necessary; it is a mere illustration at best of the intention.

Then we come to the 17th section, upon which the observation has been made, that, carrying on the work of assimilation, the Legislature here says, that "it shall be lawful for all justices "of assize" (without a special commission) "and they are hereby "authorised and empowered on their respective circuits to try "suits and proceedings pending on the Revenue side of the Court "of Exchequer, and to proceed thereon in like manner as they "can or may do in respect of causes pending on the Plea side." No application of any of the proceedings of the Common Law Procedure Acts would by itself have had that effect, because they do not deal with the subject of issuing or not issuing a commission from the Revenue side of the Court, but merely deal with the mode of proceeding when those trials take place.

Then we come to the case of error. First of all, the 18th section relates only to the period of time, which we may pass over. Then the 19th section provides that "a writ of error "shall not be necessary or used in any suit or proceeding in "error on the Revenue side of the Court of Exchequer, and the "proceeding to error shall be a step in the cause, and shall be "taken in manner and subject as"—*as* seems to be a superfluous word inserted there by accident,—it should read "subject to such "terms and conditions as to giving bail or security as may be "directed by any rule or order made by the Barons under this "or any other Act or Acts of Parliaments authorising the same; "provided that nothing herein contained shall invalidate any "proceedings already taken." That is the third matter in the nature of appeal. There your Lordships observe that the Legis-

lature apply to the Revenue side the rule which had been contained in the Common Law Procedure Act of 1852 as to the Plea side, concerning writs of error, making the proceeding to error a step in the cause, and abolishing the writ. But then this was necessary to be made the subject of special provision for, a reason very well pointed out by Mr. Justice Willes; that is to, say that there were some provisions in the Common Law Procedure Act found in company with that, which were or might be inapplicable to proceedings by the Attorney General on the Revenue side. This is what Mr. Justice Willes says upon that subject at page 177:* "The 19th section is one which requires a "remark. It is the section abolishing a writ of error; and "then it goes on to enact that 'the proceeding in error shall be "'a step in the cause, and shall be taken in manner and subject "'as to such terms and conditions as to giving bail or security "'as may be directed by any rule or order made by the Barons.' "Why? Because the provisions of the Common Law Procedure "Act following the Statute of Elizabeth were not applicable to "the case of the Attorney General, because it was thought no "doubt an absurdity that the Attorney General should enter "into a recognizance, or that any security should be given by "him; and accordingly it was necessary that there should be "rules by which the law applicable to parties should be modified; "and that to me seems quite a sufficient reason why this pro-"vision as to the abolishing of a writ of error should be "specially introduced into the Act." Now there your Lordships see that these words "shall be taken in manner and subject "such terms and conditions as to giving bail or security as may "be directed by any rule or order made by the Barons," in the other Act, go beyond that which the Barons would have been enabled to do if the power had been given to them for this purpose, simply to adopt and to apply the provisions in the Common Law Procedure Act. It was in this case desirable that they should have the power to vary for some purposes the substance of those provisions; and accordingly the Legislature itself says that the general principle is to be adopted; that there shall be no writ of error; that proceeding to error shall be a step in the cause; but the manner of taking it, and the terms and conditions as to giving bail or security connected with it, are to be made subject to the regulative power of the Barons of the Court.

That, my Lords, connects itself with what the Barons did in 1860; and I will again remind your Lordships that the Barons acting either under that power, or under the power contained in the 26th section, or both, in 1860, said at page 13 of the rules of 1860, article 101, "The several provisions contained in the 154th, "155th, 156th, and 157th, sections of the Common Law Procedure "Act, 1852, where applicable, shall extend and be applied in "like cases on the Revenue side of the Court." I think there can be no doubt that that was within the power of the Barons;

* *Vide* p. 70 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

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and if it was, it seems to me to furnish my argument with at all events the benefit of an illustration very useful to the further step which we shall have to take under the 26th section. I rather collect that my learned friend will say that that was within the power of the Barons, and that the words "shall be taken in "manner and subject to such terms and conditions as to giving "bail or security as may be directed by any rule or order made "by the Barons under this or any other Act or Acts of "Parliament authorizing the same," would authorize what was done by this 101st rule of the year 1860.

What, my Lords, are those provisions contained in sections 154, 155, 156 and 157, which are there directed to be applied on the Revenue side of the Court? I must just remind your Lordship of those provisions. They are in the Act of 1852, and they are these: "Upon such suggestion of error alleged and "denied being entered, the cause may be set down for argument "in the Court of Error in the manner heretofore used; and the "judgment roll, shall, without any writ or return, be brought "by the Master into the Court of Error in the Exchequer "Chamber, before the Justices, or Justices and Barons, as the "case may be, of the other two Superior Courts of Common "Law, on the day of its sitting, at such time as the Judges "shall appoint, either in term or in vacation; or if the pro-"ceedings in error be before the High Court of Parliament, "then before the High Court of Parliament before or at the "time of its sitting; and the Court of Error shall and may "thereupon review the proceedings, and give a judgment as "they shall be advised thereon; and such proceedings and "judgment as altered or affirmed shall be entered on the original "record; and such further proceedings as may be necessary thereon "shall be awarded by the Court in which the original judgment "was given." The two next sections also relate to that which may be done in the Court of Error, at least in part. Of course I do not assume, and do not ask your Lordships to assume, that when they made the order of 1860, applying those provisions to the Revenue side of the Court, where applicable, they may not have been exceeding their jurisdiction. I do not ask you to assume that; but I ask your Lordships to see whether it is not quite manifest that the Legislature, when passing this 19th section, did that which made it necessary that there should be power to go so far, because in the 19th section your Lordships recollect that the Legislature did not themselves move farther than this; they said that a writ of error should not be necessary, and that the proceeding to error should be a step in the cause, and they left the rest to be determined by the rules of the Court of Exchequer. They left the Court of Exchequer to say in what manner it should be taken, as well as to fix the terms and conditions as to giving bail or security. They did not themselves apply those provisions of the Common Law Procedure Act which say how it is to be done, how it is to get into the House

of Lords, how it is to get into the Court of Exchequer chamber, in what way the decisions of those Courts of Error are to be applied to the roll, and what is to be done with the roll when it is brought back from them.

Lord St. Leonards.—You will observe that section 19 is the only section in which the power is given to the Court of Exchequer to meddle with the matter which is therein enacted. But, if you will observe, it is altogether different from section 26, upon which the question before the House depends. Section 26 speaks of what may be done by the Lord Chief Baron and two or more of the Barons; and section 19 has expressly annexed to the particular abolishment the consequences of the abolishing of the writ of error to the Court of Exchequer Chamber; so that many things may be properly done under section 19 with reference to a writ of error which could or might not be done by different persons in point of fact under section 26.

Mr. Attorney General.—I do not know how your Lordship reads it in that respect; but I take the words "as may be "directed by any rule or order made by the Barons under this "or any other Act or Acts of Parliament authorizing the same," as clearly to be read with the 26th section, which says that "it "shall be lawful for the Lord Chief Baron and two or more "Barons of the Court of Exchequer from time to time to make "all such rules and orders as to the process, practice, and mode "of pleading on the Revenue side of the Court, and as to the "allowance of costs, and for the effectual execution of this Act, "and the intention and objects thereof, as may seem to them "necessary and proper." I take it to be clear, that, under that first branch of the 26th section, the Lord Chief Baron and two or more Barons may make those rules which are necessary.

Lord St. Leonards.—If you can suppose those words to be added to section 19, why does not that leave the matter to be acted upon under section 26?

Mr. Attorney General.—The answer to that simply is, that because it was not proposed to adopt *simpliciter* the provisions of the Common Law Procedure Acts as to proceedings in error, but because it was desirable to give power to vary the substance of the terms and conditions as to giving bail or security from those contained in that Act, therefore it was the subject of express enactment. Your Lordship observes that the 26th section contains two branches. The first is general. They may make orders for the government of their own process, practice, and mode of pleading on the Revenue side as to costs, "and for the effectual execution of this Act and the intention and objects thereof." That by itself would not authorize them to do anything which was not dictated to them by the Act or was not within the scope of their previous powers. Then follows the latter part of the clause, which enables them "to extend, apply, or adapt any of the pro-"visions of the Common Law Procedure Acts." That would not authorise them to deviate in substance from any of those

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proceedings, even in a case in which it might be desirable to do so.

Lord St. Leonards.—Then you mean to say that section 26, standing by itself without those words, would not have authorized that which the Barons have done under section 19.

Mr. Attorney General.—My Lord, I say it would not have authorized the whole of what they have done under section 19; it would have perfectly authorized what they have done by adopting the provisions mentioned in the first rule of 1860. But the 19th section authorizes more; it authorizes them to impose terms and conditions as to bail or security different from those provided for by the Common Law Procedure Acts, and that it was which made it necessary to deal specially with that subject. Now, my Lords, if I were not able to show that there is that specialty which would not have been covered by the 26th section standing alone, I do not think that any just conclusion could be drawn from the fact that the legislature has at once, and in the exercise of its own judgment, seen its way to go so far as to assimilate the proceeding in error to that which had been established on the Plea side. I should not think that you could draw from that the inference that it therefore did not mean any special assimilation to take place with respect to appeal, which is *ejusdem generis* with error. But, my Lords, the strength of the argument, and, to my mind, the irresistible strength of the argument drawn from the 19th section is this, that it is quite plain that the legislature meant, for the purpose of error at all events, to entrust the Barons of the Court of Exchequer with the power of saying whether those clauses, exactly *in pari materiâ* with those which we are now dealing with, relative to error in the first Act, should or should not be applied to the Revenue side. The Legislature went one step only in the direction of settling the practice in error, saying that it should be a step in the cause, and that there should be no writ of error; but it left the Barons to decide the manner, and it left them to vary even the terms and conditions as to bail and security from what was in the Acts, and it said that they might do that by any rule or order made by them "under this or any "other Act or Acts of Parliament authorizing the same." What order are they authorized to make by this Act? The orders mentioned in the 26th section; the first half of which says that they may make orders *inter alia* "for the effectual execution of "this Act and the intention and objects thereof;" therefore such orders as shall prescribe the "terms and conditions as to giving "bail or security" in the case of error. It says also that they may "extend, apply, or adapt any of the provisions of the Com-"mon Law Procedure Acts." Therefore under that power they would be enabled to fill up the gap which as to proceedings in error is left, and to say how the error is to come into the Court of Error, what treatment the record is to be subjected to while there, and under what circumstances and in

what way it is to be brought back again and acted upon when altered by the Court of Error. All that is by the 19th section distinctly and plainly left to the Barons, to be determined by the rules which they are to make under the 26th section; and therefore it does seem to me that that furnishes the strongest possible argument against the idea that they were not to be at liberty by this 26th section to extend, apply, or adapt to the Revenue side the provisions *in pari materiâ* of the Act of 1854, dealing with the substituted remedy of appeal; which I will show your Lordships afterwards is merely the substitution of one mode of procedure for another, and not a substantial change.

Then my Lords, comes the next clause, about Bills of Exceptions. "Either party may tend a Bill of Exceptions on the trial "of any issues arising on the Revenue side of the Court, and "the like proceedings may be had and taken thereon as in such "cases between subject and subject." There was nothing whatever in the Common Law Procedure Act, the application of which by itself would have caused a Bill of Exceptions to lie in a Revenue case if that Bill of Exceptions would not have lain before. In truth a Bill of Exceptions is only mentioned once in the Common Law Procedure Act as far as I remember, and that is in one of the clauses of the Act of 1852, which relates to the new procedure in ejectment. In clause 184 of that Act, a Bill of Exceptions, it is said, will lie, and a special verdict may be returned in the new action of ejectment. But for general purposes it is not dealt with at all by the Act. That is not a general clause applicable to all cases, but merely to what I may call the new action of ejectment. The general power of adopting the provisions of the Common Law Procedure Act given by the 26th section would not have introduced a Bill of Exceptions.

My Lords, in what I have been saying upon those clauses, I have been merely going through what has been pointed out so clearly and ably by Mr. Justice Willes. He introduces his remarks on this subject in this way, at the same page as before, page 177:—"It is said, however, that this construction is "excluded by certain clauses of the Act; and it is said that it "is excluded by the fact of the Legislature having given in "certain cases a right of error and appeal, and having omitted "the case in question, and by the supposed absurdity of the "Legislature intending to give a right of appeal in a case which "it has not expressly mentioned. I apprehend, with the "greatest deference to those who are of that opinion (and nobody "has better learnt how necessary and how just that deference "is than myself,) that that argument may be retorted with "double force upon those who assert that the right of appeal in "this particular case is excluded by a right of appeal being given "in the cases mentioned in the Act. Because not only will this "be found to be a case of appeal *ejusdem generis*, but it will be

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" found that the cases in which appeal is granted by the Legis-
" lature first of all, are cases in which the special interference of
" the Legislature was necessary; because under the 26th section
" such a power could not have been given; and, secondly, that
" at least one of those cases of appeal is a peculiar one, and
" belonging to the Revenue jurisdiction only." He goes through the sections, and he shows that with the exception of that one which depends upon consent, namely, the 10th section, and which it was not necessary to remit to the discretion to be exercised by the Court, with that exception, every one of the others does something which upon the largest construction of the 26th section could not have been done under that section. One gives an appeal in cases under the Succession Duty Act which would be wholly outside the provisions of the Common Law Procedure Acts entirely. Another gives a writ of error upon a compulsory special case to be stated under the Legacy Duty Acts, and from rules under those Acts equally outside the provisions. A third gives a bill of exceptions equally outside the Common Law Procedure Acts. And a fourth, although it travels a certain way with the Common Law Procedure Acts in the abolition of the writ of error, and saying that proceeding to error shall be a step in the cause, yet foreseeing the necessity of departing in some respects from the recognizance and security part of the clauses relative to that subject, it gives a special power to do that to the Court, remitting it for the mode of exercising that power to the 26th section.

But now, my Lords, let us see whether there be anything so unreasonable in the notion that the Legislature should delegate to the Court a power so extensive as that which my argument assumes. Mr. Justice Willes observes that he cannot see it. There is abundant precedent, if precedent be necessary, of what is termed the delegation of legislative power. After all, my Lords, it is surely a fallacy to use that language with respect to it, because the Legislature has given the power and has defined the subject upon which it is to be exercised. It may be exercised with regard to the Revenue side of the Court of Exchequer, and it may be exercised by applying or adapting to that particular subject, not whatever the Court of Exchequer pleases, but enactments which the Legislature has already carefully made, and has applied already to those subjects to which, in the first instance, it considered them applicable; and then foreseeing that they may be, or that some of them may be, usefully applicable to other subjects, it has given with regard to some Courts to the Crown by Order in Council the power of so applying them; and with regard to revenue matters in the Court of Exchequer it has given that power to the Judges of the Court of Exchequer who are most peculiarly conversant with that subject. There is nothing unreasonable in that, and as Mr. Justice Willes, at pages 175 and 176, points out, there are very many examples of similar provisions in Acts of Parliament; the Act defining

the scheme, showing what the law is to be, and the cases to which it is to be immediately applied, in detail; but having suspended the application of it to certain other subjects till a competent authority which it trusts has decided that it is expedient that that scheme shall be applied to those subjects. Is there anything unreasonable in that?

Lord St. Leonards.—The Act of Parliament having got beyond the Common Law Procedure Act, and brought a bill of exceptions on the Revenue side of the Court of Exchequer by express enactment, and not having taken cases of appeal which were supplied by the order of the Barons of the Exchequer from the Common Law Procedure Act, that affords no inference that they meant to provide an express mode of appealing in the Exchequer on the part of the Revenue by that section which you are now considering,

Mr. Attorney General.—I think it affords none whatever, my Lord. What they did in that respect was necessary to produce an assimilation, which could not have been done by the mere power to adopt the provisions of the Common Law Procedure Act.

Lord St. Leonards.—They were not leaving it to the Barons, but they were doing it themselves. I only wanted to see how you would meet that case, supposing it to be argued, whether section 20, giving express power to tender a bill of exceptions, and so in effect giving an appeal, does not exclude the implication of an intention on the part of the Legislature by section 26 to give power to introduce those modes of appeal pointed out by the Common Law Procedure Acts.

Mr. Attorney General.—I should submit, my Lord, that it does nothing of the sort. If it was the object of the Legislature to do these two things, to assimilate, as far as possible, the practice on the Revenue side of the Court of Exchequer to that on the Plea side, and if it was the object of the Legislature to put the subject, as far as it could, in so favourable a position, there were two modes by which it could be accomplished; one by itself going over the whole of the ground, and working out the whole thing in detail; and the other by legislating itself upon those points on which the scheme of the Common Law Procedure Acts was not self sufficient, and on other points leaving it to the Judges of the Court of Exchequer to determine how far the peculiarities of the Revenue practice offered obstacles to the adoption of the Common Law Procedure Acts and their provisions. My Lords, I say that on the face of the 26th section the Legislature, having done that which it was necessary for itself to do, and which could not be done by a reference to those Acts alone, in order, as far as it could, to put the practice on the Revenue side of the Court on a footing to be assimilated, then by the 26th section, it expresses the desire of the Legislature that that assimilation shall be carried as far as it can be; and it leaves the Barons of the Court, who are the best judges of any

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peculiar difficulties which there may be, owing to the peculiar nature of the proceedings on the Revenue side, to judge how far it is possible, having regard to the nature of those proceedings, to extend, apply, or adapt all or any of the provisions of the Common Law Procedure Acts. The reason why the Legislature has not gone further than it has done is this: that those Acts contain a code, that code is made applicable in the Queen's Bench, in the Common Pleas, and upon the Plea side of the Court of Exchequer; and that code is the *norma*, the rule to which the Legislature desire, as far as may be, to assimilate the procedure upon the Revenue side of the Court. There are some differences between the procedure on the Revenue side of the Court of Exchequer and the procedure in the other Courts, which it is unnecessary to retain, and which even the adoption of the Common Law Procedure Acts will not remove; those differences it removes itself, as, for example, by introducing the bill of exceptions. There are some other changes which are beneficial to the subject, applicable to particular modes of procedure in the Court of Exchequer, with which the Common Law Procedure Acts were not adapted to deal, and with those the Legislature also deals itself; and having so dealt with those subjects as to put the procedure in the most favourable condition to be adapted to the Common Law Procedure Acts, then it refers to that code. It says that it desires that code to be adopted as far as it can be, and it gives power to the Barons, who best know the peculiarities of Revenue proceedings, to judge of that, but it tells them for what purpose,—that they may adopt all or any of those provisions as may seem to them expedient, for what? "For making the pro-"cess, practice, and mode of pleading on the Revenue side of the "said Court as nearly as may be uniform with the process, practice, "and mode of pleading on the Plea side of such Court." Now, the Legislature has expressed that to be its intention, and your Lordships will be asked to hold that it is inconsistent with the intention so expressed to suppose that this particular procedure by way of appeal, of which I am now going to speak, should be adopted merely because it is left to be dealt with in that general way, and is not made the subject of special enactment and legislation; those things which are made the subject of special enactment and of direct legislation being shown to be such, as this general power would not by itself have been sufficient to cover. The ultimate question upon that really seems to us, as it seemed to the three judges of the Court of Common Pleas in the Exchequer Chamber, to be this:—Is it true, or is it not true, (it was so argued,) that there is a substantial difference made, I mean a new right given, by introducing this mode of appeal? Is the appeal, as distinct from the bill of exceptions, a matter of procedure merely, a more convenient and better procedure in the cases to which it can be adapted, or does it give a substantially different right? The test is, whether you are enabled by this mode of appeal, adopting those provisions out

of the Common Law Procedure Act, to bring anything to the Court of Appeal which you could not otherwise have brought by a bill of exceptions; because if you cannot bring anything in that way which you could not have brought by a bill of exceptions, then it is merely an adaptation to this class of cases of that more simple and convenient mode of procedure, for the same end, which the legislature has found it desirable to adopt in other cases.

Now, my Lords, upon that subject I will refer to what Mr. Justice Willes and to what Chief Justice Erle say. Mr. Justice Willes says, in the latter part of his judgment, at the top of page 178,* "But now comes the question of an appeal upon a rule "for a new trial, which may be without the leave of the Court "when it is divided, and without the leave of the Attorney "General. Why should that discretion be vested in the Barons "of the Court of Exchequer, and why should it be for them to "say that appeal should lie in such a case? I own that I see no "difficulty in answering that question, because I conceive that "the appeal upon a special case after the argument of a new "trial is only a more convenient mode of raising a question which "could have been raised upon a bill of exceptions. Am I "right in saying that you could raise under a bill of exceptions "the sort of question which is desired, so far as I can judge "from the proceedings, to be raised here? I am of opinion that you "can. It is said ordinarily that you cannot except to non-direc-"tion, that is to say, to the judge not having directed upon a "particular point. That is so ordinarily, no doubt, and if it were "not so, a Judge could never select the point which he perceives "to be the only real one in dispute, and leave that alone to the "jury, disembarrassing their minds of what has become imma-"terial for them to consider, because it has either expressly or "tacitly been admitted. Such was the ruling of the House "of Lords in a case which is cited so frequently, the case "of Anderson *v.* Fitzgerald (4 House of Lords, 484.) But it "would be quite a mistake to suppose that if a Judge, having "omitted to state a proposition which ought to be stated in the "affirmative or in the negative, states or omits to state a point "of law to the jury, so as that they may be misled as to facts "of the case, which it was material for them to consider, and "Counsel calls the attention of the Court to that omission, and "the judge declines to correct the impression which has been "produced by the omission and by his silence upon the subject,— "it would be a mistake, I repeat, to say that a Bill of Excep-"tions may not be tendered. In order to tender a Bill of "Exceptions, upon an omission, the counsel must call the "attention of the Court to it, and it must be the omission of a "direction in point of law which may induce the jury to look "to facts which they ought to consider as irrelevant, or to

* *Vide* p. 70 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

" omit from their minds facts which they ought to consider " important. And such was the opinion of the Judges in the " recent case of Macmahon *v.* Leonard (6, House of Lords, " 996). Mr. Justice Wightman, in delivering the opinion of " the Judges in that case in the House of Lords (page 996), so " laid down the case, with the assent of all the Judges who were " then present; and I repeat, therefore, that those points which " may be taken at the trial by a bill of exceptions, if the " exceptions are properly framed, may be taken, and none other " that I know of, upon the argument of such an appeal. If the " statute with respect to bills of exceptions had directed, as we " know it does in one part of the kingdom, that the exceptions " should first be argued before the Court of First Instance, and " should afterwards go to the Exchequer Chamber, this would " be nothing more than, in substance, changing a proceeding by " bill of exceptions, which is full of expense and technicality, into " a simpler and more beneficial proceeding by way of appeal, " against the ruling of the Court upon a point which might have " been raised at Nisi Prius upon a bill of exceptions." And Chief Justice Erle, at page 184,* says, " With regard to the second " objection, that the order, if valid, would subject suits to " a ground of appeal which did not exist before, my answer is a " denial of the fact. In my opinion, the order of the Barons " did not create any new ground of appeal; the order applies " section 35 of the Act of 1854 to the Revenue side."

Lord St. Leonards.—The question is, whether the Barons created, not a new ground of appeal, but a new right of appeal. That was the distinction.

Mr. Attorney General.—Of course, any new form of appeal may be spoken of as a new right of appeal with perfect accuracy in one sense; but when we are considering whether those general words of the Legislature are unreasonably interpreted as extending *quoad hoc*, it is most material to see whether that which they introduce upon our view is procedure or something different. If it be a substitution of a more convenient mode of raising the same question before the Court of Appeal, which might in a less convenient mode have been brought to the Court of Appeal by a Bill of Exceptions, then you see it is in the strictest and most proper sense a matter of procedure; and, as I humbly venture to think, it is most material for that purpose to see whether the ground upon which the appeal may be brought, is the same matter which by another form of proceeding might be raised upon a Bill of Exceptions.

Lord St. Leonards.—Do you understand the learned Judge to have given an opinion in effect, that if section 20 were not in the Act of Parliament, section 26 would have authorized the Barons to have supplied the deficiency?

Mr. Attorney General.—No, my Lord, I think not, and for

* *Vide* p. 79 of report of "*Argument in the Exchequer Chamber.*" (Vol. 3.)

this plain reason, that there is nothing whatever in the Common Law Procedure Acts which would have had that effect.

Lord St. Leonards.—There are two parts of the section.

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Mr. Attorney General.—Yes. But the earlier part of the section would have had that effect still less, because the earlier part of the section, taken by itself, does not go into the question of applying any provisions of the Common Law Procedure Acts.

Lord St. Leonards.—There being nothing in the Common Law Procedure Acts with regard to a Bill of Exceptions, except what could not relate to this, therefore it would be within your section. I do not say that that is my opinion. I am merely asking you whether that is not so.

Mr. Attorney General.—No, my Lord; as I understand it now, the section is divided into two branches: the first branch relates simply to rules and orders which the Court may make for the regulation of their own proceedings and which of course, by itself, never would enable them to create a new appeal. That is clear, because that by itself, if there were no more, could not be brought within the Common Law Procedure Acts. I think the first part of the section contains valuable matter in aid of the argument, but it is, of course, under the second part of the section that the rule is taken which enables the Court *per expressum* to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts of 1852 and 1854. Without that, undoubtedly the Court could not in making orders for the regulation of its process, practice, or pleading have gone beyond the ambit of what previously was its process, practice, or pleading; and the Court, in making orders to carry into effect the particular provisions of this Act, could not have gone beyond the ambit of those particular provisions. The earlier part of the section relates only to three things,—orders relating to the practice, process, and pleading of the Court itself; orders relating to costs, and orders relating to the execution of the particular intention and objects of the Act. Of course, if there had been nothing about Bills of Exceptions in the Act, that could not have been done for the execution of the objects of the Act; and if there were no Bill of Exceptions before, it would not have been within the range of the practice, process, and pleading of the Court, independently of the Act; and of course it is not costs. Therefore, a Bill of Exceptions could not have been introduced under that first branch of the clause, if the Act had not expressly given it. But then, under the second branch of the clause, it could not have been introduced; because, there is nothing about it in the Common Law Procedure Acts; and therefore it is clear that the Legislature, if it meant in that respect to lay the foundation for the assimilation of the proceedings on both sides, was under the necessity of doing that itself; and it did it; and having done it, then it went on to say, generally, with regard to the whole platform and scheme of the Common Law Procedure Acts, we entrust the

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Judges of the Court of Exchequer with the power of determining, how far those provisions may be fit to be adopted with a view as far as possible of assimilating the proceedings, making uniform is the word—it is more than assimilating, making uniform, producing uniformity between the proceedings on the Revenue side and the proceedings on the Plea side of the Court.

Lord Chancellor.—Then it leaves open the question whether the 35th or 36th sections of the Act of 1854 can be properly said to relate to the process and practice of the Plea side of the Court of Exchequer.

Mr. Attorney General.—Will your Lordship allow me just to state the way in which it strikes me that that stands under the Act, and will your Lordship do me the favour to look carefully at the same 26th section.—The second branch of it, to which I refer, is in these words: " and also from time to time by any " such rule or order to extend, apply, or adapt any of the pro- " visions of the Common Law Procedure Act, 1852, and the " Common Law Procedure Act, 1854," (I omit the words about rules of pleading and practice) " to the Revenue side of the said Court."—Now let us stop there for a moment—we will deal with the words, and speak of the purpose and the object afterwards—but the power is " to extend, apply, or adapt any," which I say means " all or any of the provisions of those two Acts " to the Revenue side of the said Court."

Lord Chancellor.—You must not stop at the word " provisions."

Mr. Attorney General.—No, my Lord not eventually, but I think we are quite at liberty to stop there in the first instance, because the words which follow give the rule and the object for which that is to be done—but the words which give the power are those which I have read.

Lord Chancellor.—We have only to ascertain the subject matter of the power, the thing on which the power is to operate, and that is the provisions relating to the process and practice of the Plea side of the Court of Exchequer.—Now, in the 35th and 36th sections of the Act of 1854 the provisions relate to this process, practice, and mode of pleading on the Plea side of the Court of Exchequer.

Mr. Attorney General.—I should say that the 36th is merely the sequel of the 35th, and necessary to give effect to it, but even putting that so, I should say, and say confidently, that the 35th section deals distinctly with that which in the most accurate and exact sense is process and practice of the Court of Exchequer itself. The 36th is merely that which is necessary to give effect to the 35th and which is the consequence of it. But your Lordships will pardon me if I ask you just to suffer me to place before you, as I wish, the argument upon the very words of this branch of the section, because it strikes me that attention to those words will lead you to qualify the way of putting it which your Lordship has just now used. The clause does not then limit the power to that which is properly relating to the practice or process

of the Revenue side of the Court. The subject of the power is the provisions of the Common Law Procedure Acts, and the words are "any of the provisions." I agree that it must be such an extension as will have a tendency to produce the object mentioned in the concluding part of the clause, and we must carefully consider that; but in the first instance we must observe that the power is to extend any of the provisions of those Acts to the Revenue side of the Court. Let me for a moment pause there, and ask this question: If the Legislature had itself said that those clauses, that your Lordship has mentioned, namely clauses 35 and 36, shall be extended and applied to the Revenue side of the Court, could there have been the least difficulty in the interpretation of such an enactment? None whatever. It would have meant, of course, that they were to be extended and applied to causes on the Revenue side of the Court, from which causes appeals might be taken in the manner there described. Surely, my Lords, if the words had stopped there, there would have been no difficulty. Then, let us see what is the true import of the words which follow: "As may seem to them expedient for "making the process, practice, and mode of pleading on the "Revenue side of the said Court as nearly as may be uniform "with the process, practice, and mode of pleading on the Plea "side of such Court." I take the inference from these words to be this: that they may extend and apply any provisions, the extension of which will be useful for that purpose; and much more, if necessary for that purpose; and though the provisions may themselves go beyond the process, practice, and mode of pleading on the Revenue side of the Court, according to the strict interpretation of those words, yet, if the extension, application, and adaptation of those provisions to the Revenue side of the Court is expedient for the purpose of making the process, practice, and mode of pleading on the Revenue side as near as may be uniform with that upon the Plea side, then they may for that purpose extend, apply, or adopt any of the provisions whatever.

Lord Chancellor.—Surely, Mr. Attorney General, even if the provisions do not relate to process or practice, yet the adaptation of those provisions might tend to render the process and practice on the Revenue side uniform with the process and practice on the Plea side?

Mr. Attorney General.—Yes, my Lord. In order to do full justice to that view of the point, it should be put in this way: That they do not exclusively relate to that; because that they do in part relate to it, is perfectly clear. There is a series of provisions which tell you, that upon certain things taking place in the Exchequer upon the Revenue side, in the course of this process, the right to appeal is to accrue; and the Judge may say, in some cases, in his discretion, whether the appeal shall be allowed or not; and then, in the Court of Exchequer, but still as part of this process and practice, proceedings are to be taken to get the

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preliminaries of the appeal prepared. The case is to be settled, if the parties differ, by a Judge of that Court. All that is to take place in the Court of Exchequer itself, and then it is to go on necessarily of course for that purpose to the Court above, the Court of Error, and to come back again. Therefore, you have a series of provisions which begin in the most literal sense in the process and practice of the Lower Court, which end in the most literal sense there again, but which necessarily, to effectuate their object, carry you through the intermediate Court of Error, or of Appeal. I say, my Lords, that if the extension and the application of those provisions be expedient for the purpose of rendering the process, practice, and mode of pleading on the Revenue side, uniform with that upon the Plea side, there is full and ample power to extend, apply, and adapt them; and I say, that not only is it expedient, but it is absolutely necessary, because, if that is not done, instead of uniformity, you will have most important differences: differences in procedure, not affecting the substance, because the same point may be attained in the old circuitous, embarrassed, and objectionable manner, subject to all those difficulties which, we know from the history of the law, have led to the general adoption of a motion for a new trial, on the ground of mis-direction in preference to a bill of exceptions; nay, which even in such a work as Blackstone itself, and in Mr. Justice Coleridge's notes to that work, are noticed in that very point of view. Your Lordships will find, in the third volume of Blackstone, page 372, when speaking of the old Demurrers to Evidence, and of a bill of exceptions, he says at the end of that passage, "Neither those demurrers to evidence "nor the bills of exceptions are at present as much in use as "formerly, since the more frequent extension of the discretionary "powers of the Court in granting a new trial, which is now very "commonly had for the mis-direction of the Judge at *Nisi* "*Prius*;" and the books are full of places in which the superior convenience of that practice is mentioned.

Lord Chancellor.—This extended form of appeal is a great boon and benefit to the suitor. Now, is it not contrary to the spirit of all our Legislation, and of all our decisions, that so great a benefit to the suitor in Revenue cases, in a court of taxation, should be made to depend upon the pleasure of the Judges.

Mr. Attorney General.—I think not, my Lord, when you find the way in which the whole subject is dealt with.

Lord Chelmsford.—Will you permit me to add something to what the Lord Chancellor has put? The rules and orders which are to be made under the 26th section may be altered and varied by the Judges.

Lord St. Leonards.—That is the question.

Lord Chelmsford.—According to the 27th section those rules may be altered.

Mr. Attorney General.—I think not, my Lord. The 27th section relates to writs and forms of proceedings and scales of costs.

Lord Chelmsford.—I do not think it necessary to go to the 27th section, but I think from the 26th section that they may make such rules and orders "from time to time," and therefore I apprehend that they may vary the orders which they have made. Now that would be very reasonable if the words "process, prac- " tice, and mode of proceeding," are strictly construed; but if they are to apply, as you say, to the case of their being able to order an appeal, then they may cancel that afterwards and make away with the appeal which they have granted.

Mr. Attorney General.—The answer that I make to that is a very simple one. I do not think that those words "from time to time," in the construction of the 26th section have any such effect with regard to the provisions of the Common Law Procedure Acts which are adopted.

Lord St. Leonards.—The words are repeated at the beginning of that second branch.

Mr. Attorney General.—I know that they are, my Lord, but observe what they are from time to time to do is from time to time to extend, apply, or adapt; that is to say, they may apply one portion as they did in 1860, and they may apply another portion at any other time that they think expedient.

Lord St. Leonards.—Do not understand me as expressing any opinion, but I merely want to hear what you have to say upon the point.

Mr. Attorney General.—Your Lordship will not suppose for one moment that I thought that you were. I am merely making my observations upon the point suggested. And I say that when you are dealing with rules and orders, in their nature revocable, then they may in their nature be revoked, but when you are dealing with the statutory power from time to time to extend or apply the provisions of a particular Act of Parliament, it is simply from time to time to extend and to apply, and not to revoke.

Lord Chancellor.—Does not the form of expression involve a right to do this—to make a rule or order for a temporary existence or to make it during pleasure?

Mr. Attorney General.—I should think not, my Lord. I should think it means this: that they are not obliged to proceed *uno flatu* and exhaust the powers all at once. They may at one time (as they did in 1860) apply certain provisions which they at the time are satisfied that it is convenient and proper to apply.

Lord St. Leonards.—Do you suppose that they have power to limit it—say to 10 years?

Mr. Attorney General.—I should think not, my Lord; that is, not as I understand it. Extending or applying the provisions of an Act of Parliament, in my humble conception, means, that Parliament gives the power to extend to a new subject the provisions of the Act of Parliament. Where that power has been exercised, the provisions of the Act of Parliament attach upon the subject as by virtue of the Legis-

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Mr. Attorney General.—Yes, my Lord.

Lord St. Leonards.—One would expect to find some different words:—"and also from time to time by any such rule or order "to extend, apply, or adapt any of the provisions of the Com- "mon Law Procedure Act, 1852, and the Common Law Pro- "cedure Act, 1854, and any of the rules and practice on the 'Plea side of the said Court, to the Revenue side of the said 'Court, as may seem to them expedint for making the process, "practice, and mode of pleading on the Revenue side of the "said Court as nearly as may be uniform with the process, "practice, and mode of pleading on the Plea side of such Court." It appears, I confess, to me, at present, that those words in the second part of the clause are intended to restrict the words in the first part of the clause; with this difference, that in the one you are left at large, within the bounds of the clause, to do what you think right; and in the second you are restricted, in doing what you think right, by what is in the Common Law Procedure Act. It appears to me for the moment that the words seem to restrict you as to what you should do under the first part of the clause, just as much as the words will restrict you under the second, except that the one is larger, and the other gives you a precedent to go by. But would it enable you to do anything under the second part of the clause, in consequence of the Act, which you could not have done under the former part of the clause?

Mr. Attorney General.—I say, my Lords, that the germ of the right answer to that is found in the words "and also," which introduce the second branch. It is clear that the Legislature means something additional,—a power which had not already been given by the words which precede,—something not comprehended in the generality of the previous words, by those words "and also." Of course if there was nothing more authorized by the second branch of the clause than could have been done under the first, in the first place the whole of it would appear to be superfluous, and in the second place the words "and also" would be not only superfluous, but inappropriate. The Legislature plainly considered that it was giving a further and additional power; and to my mind the difference is most manifest. That which was new was this: they might extend any of the provisions of the Common Law Procedure Acts which they thought convenient for this purpose, those Common Law Procedure Acts going much beyond the scope of anything which could not have been done under the first branch of the clause as it stands alone. And that is the argument which I was going to have urged. I was going to have said that any construction but ours would have the effect of reducing to silence those later words. My learned friends will say, that there was nothing capable of being done under them which might not have been done under the first part of this clause standing alone. Now what is there in the words of the second branch which can possibly be said to limit the power of extending and applying the provisions of the

Common Law Procedure Acts? Merely those last words "as may seem to them expedient for the particular purpose."

Lord St. Leonards.—For what purpose?

Mr. Attorney General.—The purpose is, that of producing the greatest possible degree of uniformity between the process, practice, and mode of pleading on the Revenue side and that on the Plea side; and that greatest possible degree of uniformity cannot be produced if you leave out those clauses which relate to this kind of appeal, for then you would have motions for a new trial upon a totally different footing upon the one side, and upon the other; and you would have only one mode of raising questions of law so that they could be carried to a Court of Appeal, namely, by bill of exception on the one side, whereas upon the other you would have a more convenient mode of accomplishing that object, substituted for the bill of exceptions.

Lord St. Leonards.—Then as to the process, practice, and mode of pleading, the first part of the clause admits of a different construction from those same words in the other part of the clause.

Mr. Attorney General.—I do not think you quite appear to follow me, my Lord. I do not say that the words "process, practice, and mode of pleading," are to be construed differently; but I say, taking them in the second branch in the same sense which you apply to them in the first in that same sense the adoption of those provisions as to appeal is necessary in order to attain the greatest possible degree of uniformity in the process, practice, and mode of pleading, even in the Court itself, because on motions for a new trial in the Court itself, upon the Plea side to which the Common Law Procedure Acts apply, all those proceedings with a view to appeal, which are steps in the cause, are all proceedings which take place in the Court itself.

Lord St. Leonards.—Then the Legislature, of course, failed very much in its object and in its duty in the way in which it framed the Act of Parliament.

Mr. Attorney General.—I do not presume so to judge the Legislature, but it is clear to me that the Legislature thought that it could trust the Court of Exchequer to perform a very important operation, namely, the operation of discriminating, with reference to Revenue cases, those provisions of the Common Law Procedure Acts, which it was expedient to apply.

Lord St. Leonards.—The work did not seem to be very laborious; they copied out the clauses from the former Act, there was not much labour in that.

Mr. Attorney General.—Whether it was laborious or not, I cannot tell; but we are dealing with the Act of Parliament; and the Act of Parliament has upon the face of that clause certainly given to the Barons of the Exchequer the power to extend, apply, or adapt any of the provisions of those Acts which they may consider if expedient to extend, apply, or adapt for a particular purpose; and that purpose appears to me to be one, which is not only advanced by the adoption of these provisions out of those Acts, but also one which cannot possibly be accomplished

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without it; and I cannot even suggest to my mind a plausible reason, other than that which my Lord Chancellor put, namely, a supposed disinclination to give the subject as ample justice in Revenue cases as in others. I can hardly suggest to my mind any other plausible reason why this particular mode of raising questions of law before a Court of Appeal should not be adopted in the one case as well as in the other. Well now, my Lords, as to that, I think, if we look through this Queen's Remembrancer's Act, we shall see in all its positive provisions an anxious desire on the part of the Legislature to give as many convenient and easy modes of appeal as possible to the suitor on the Revenue side as on the Plea side.

Lord Chancellor.—Undoubtedly they might have abstained from doing this, knowing that it would be used in a manner to delay and sometimes to procrastinate and to offer insuperable obstacles to the conduct of the Court.

Mr. Attorney General.—Would your Lordship really think that that is a view to be reasonably imputed to the Legislature?

Lord Chancellor.—I do not know that it is, but very possibly it might be so. Your argument has a material advantage in this conclusion, which I put for you, and it is very material for the opposite side to consider it: unless those provisions are transferred the practice in respect of appeals on the Plea side will differ from the practice in respect of appeals on the Revenue side.

Mr. Attorney General.—And not only in respect of appeals, but in respect of those proceedings from which the appeal may be taken.

Lord Chancellor.—Quite so.

Mr. Attorney General.—I know very well that everything which your Lordship is so good as to say is merely intended for our assistance, and it is in that point of view that I am taking it. Your Lordship repeated, merely for my consideration, an argument which is, in fact, found in the judgment of some of the majority of the Court; namely, that the possibility of this process being used for delay might be a reason why it should not be adopted in those cases. My answer to that is this:—I cannot imagine that your Lordships will judicially think it reasonable to suppose the Legislature to have acted upon a view, which you find the Legislature has not acted upon with regard to all subjects of the realm for every other purpose; because if this mode of proceeding is a proceeding more liable to be abused for the purpose of delay and otherwise than the old bill of exceptions, why has the Legislature thought fit to substitute it as a more convenient and better mode of proceeding, and one tending to amend and to simplify the proceedings in Courts of Common Law, in all cases where property, however large, may be involved in ordinary litigation between subject and subject? It is not conceivable, upon the view of those Acts taken together, and I include the Queen's Remembrancer's Act with the rest,—it is not conceivable, I say, that you should impute to the Legislature a disposition, as between subject and subject, to introduce, as a more

convenient and better process, a process, which, when considering the case of the Crown, it regards as one more calculated to lead to delay and expense. There is no indication of such a thing; and it is obvious that that is not really the view upon which the Legislature has acted. And when we remember what has been always felt and said about procedure by bills of exception, and how difficult it is to bring them to bear without the technicalities and embarrassments which have really led to this revolution in the practice, I think it would be a strange intention to impute to the Legislature, in an Act so framed as this, that it was meant to leave either the subject or the Crown intentionally to the bill of exceptions alone, and to exclude from the uniformity, aimed at as the general object, this particular part of the system.

Now I promised, my Lords, to remind your Lordships of what was said by Mr. Justice Coleridge in his note to Blackstone, 3rd volume, page 393, upon the subject of new trials; and I cannot but think that what he says there, both as to new trials and bills of exceptions, is worthy of attention, as probably stating in a summary and convenient form the very substance of the views on which the Legislature may have acted when they introduced this amended mode of procedure generally as between subject and subject, in addition to the proceeding by bill of exception. He says there, "The principle upon which "a new trial is granted is, I conceive, the same upon which "any trial proceeds—the attainment of justice;" and then he goes on to speak of the rules upon which the Courts are in the habit of acting when new trials are granted. Then he says, "It is "stated in the text, that the ground of the application, if it "arises from what passes at the trial, is taken from the judges "report,—and certainly, so far as regards the evidence, no "method can be suggested more decorous or proper. But it "will not be deemed disrespectful in me, I trust, if I suggest "doubt whether the same mode is so unobjectionable when the "application is made on the ground of a misdirection." And then he goes on to state the circumstances which create a difficulty in attaining to an exact understanding of what it is that a judge has really meant to rule, and mentions that as creating a difficulty even with respect to applications for a new trial on that ground. But that difficulty is of course much more forcibly applicable to bills of exceptions. If the strict practice as to bills of exceptions is followed, you must be ready to come to an agreement with the judge at the moment, putting down exactly what you mean to except to; and we know that the surprise and the difficulty arising in that case would be constantly an obstruction to justice; and in order to avoid that, the settling of the bill of exceptions at the time of the trial is constantly waived, and it is agreed to be done afterwards, and then afterwards those difficulties arise. An understanding can hardly be arrived at with respect to what the effect of the direction really is. But when you go to make a motion for a new trial, although you then must take

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it from the mouth of the judge, yet when you come to the judgment you know at least with certainty on what view of the direction the Court proceeds; and the judgment as given either does or does not involve a matter of law. If it does, then your are relieved from all those difficulties which embarrass you in settling a bill of exceptions; and upon that matter of law it is most convenient by this new method to take the very same point to the Court of Error, which but for those embarrassments and those difficulties you had a right to take and would have taken by means of a bill of exceptions. And there is another advantage pointed out, I think incidentally, by Mr. Justice Crompton, in the course of the argument below. He did not point it out as an advantage, but it appears to me clearly to be one. Supposing that this were to happen, that there is a point ruled at the trial, and a motion for a new trial, and a new trial granted, it would go down to be tried upon the view of law taken by the Judges who granted the new trial. Then that law of course would be laid down to the jury, and the jury might act upon it or not, but we will assume that they would act upon it, and then a bill of exceptions might be taken to that ruling—so that you would get back to the same point. The view of the law upon which the Judges proceeded if the new trial were granted, would in a later stage be liable to be made the subject of a bill of exceptions. If therefore the Court confirmed the law laid down at the trial, and refused the rule, then the Court would be proceeding upon that view of the law which was laid down at the trial, and in respect of which a bill of exceptions would then have lain. If, on the other hand, a new trial were granted, and the law laid down differently, then the parties would be sent back to trial, and that law would be acted upon, and the party against whom the ruling was so made would then have his opportunity of raising the same point by bill of exceptions. So that in any way the point would be liable to come before a Court of Error by bill of exceptions; and the right of the Crown and of the subject is to bring it by bill of exceptions; but this mode substituted in ordinary cases for that is a more convenient one, and one which tends to avoid circuity, and prolixity of litigation in many cases.

I submit to your Lordships that whether you look at the nature of the subject matter or at the express terms of the enactment, what the Barons of the Court of Exchequer have done, is both within the reason of the power and within its very words; and that it would be a thing most unfortunate, and really defeating the very object for which the power in the 26th section was given, if your Lordships should feel yourselves obliged to hold that it does not extend to this matter.

The Solicitor General.

Mr. Solicitor General.—My Lords, this case has been so very fully argued by the Attorney General, that I do not think it will be necessary for me to detain your Lordships at any great

length; and I will merely advert to what appears to me to be the leading considerations which will tend to a correct view of the case.

My Lords, the whole question depends upon the construction of the 26th section of the 22nd and 23rd of Victoria, chap. 21.; and I will take the liberty once again, and only once, of calling your Lordships' attention to what the provisions of that section are. That section is divided into two clauses,—the first clause says, "It shall be lawful for the Lord Chief Baron and two or "more Barons of the Court of Exchequer, from time to time "to make all such rules and orders as to the process, practice, "and mode of pleading on the Revenue side of the Court, "and as to the allowance of costs, and for the effectual execu- "tion of this Act, and the intention and objects thereof, as may "seem to them necessary and proper." Now, my Lords, if the sole object of the Legislature was what will be contended on the other side, namely, to enable the Barons of the Exchequer to deal only with what is the process, practice, and pleading in the strictest possible sense, namely, which goes on within the four walls of their own Court, for that was the expression used in the Court below, the section might have stopped there, and it would have been quite unnecessary to have added another word. But it is clear that the Legislature desires to do something more —desires to confer upon them some greater power—because it proceeds to enact in addition to this, "And also from time to "time by any such rule or order to extend, apply, or adapt any "of the provisions of the Common Law Procedure Act, 1852, "and the Common Law Procedure Act, 1854, and any of the rules "of pleading and practice on the Plea side of the said Court to the "Revenue side of the said Court, as may seem to them expedient "for making the process, practice, and mode of pleading on the "Revenue side of the said Court as nearly as may be uniform with "the process, practice, and mode of pleading on the Plea side of "such Court." Now, my Lords, I should collect from this section that the Legislature had thought, that in the previous clause, they had not effectuated their intention of making the two sides of the Court uniform in their procedure; and it was for that purpose, for effectuating that intention through the medium of the Barons of the Exchequer, that the second part of the clause was added, giving additional powers to those powers contained in the first part. Now, my Lords, what is the construction of this second part of the section? Power is given to adopt *any* of the provisions of the Common Law Procedure Acts. *Primâ facie*, of course, that would be taken in its literal sense; but it is argued or will be argued on the other side that "any provisions" must be taken with a qualification,—it must mean any provisions exclusive of those relating to appeal. And the same argument will also be good for this, that "any" must be read as exclusive of all provisions relating to Error; because it will be said that proceedings relating to

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appeal and proceedings relating to error are not a portion of the process, practice, and pleading of the Revenue side of the Exchequer. It will be said that such proceedings are not within the Exchequer; they are not within the four walls of the Court.

Now, my Lords, the question appears to me to be this: Can this power which is given to the Barons of the Exchequer, to make the process, practice, and pleading on both sides of the Court of Exchequer as uniform as possible, be exercised without the power of adapting the provisions relating to Appeal or the provisions relating to Error? Another way of stating the same question is this: Can it be said that the procedure on the two sides of the Court of Exchequer is uniform, or as uniform as possible, if all the proceedings relating to Appeal apply to one side of the Court and not to the other? I submit that that is not so; and I apprehend the question to be very much the same as if the Legislature, instead of saying that the Barons of the Exchequer may adapt any of the provisions of the Common Law Procedure Acts they please for this purpose, had said, All the provisions of the Common Law Procedure Acts as are proper for the purpose shall be adapted to the Revenue side of the Court of Exchequer, for the purpose of making the procedure on both sides uniform.

Now, my Lords, this leads us to the consideration of the question,—What is the meaning of the words, "process, practice, "and mode of pleading?" Is it to be taken as strictly confined to what goes on within the Court of Exchequer, and as excluding every thing which goes on without it? For that must be the argument on the other side, and that was the argument in the Court below.

My Lords, I observe in the first place upon that, that the very learned and eminent persons on whose reports these Common Law Procedure Acts were framed, made two reports, and the powers entrusted to them were to inquire into the process, practice, and pleading of the Superior Courts of Common Law at Westminster. They had no other powers.

Lord Chelmsford.—We have the Act of Parliament, which would speak for itself. We need not take into consideration what they did.

Mr. Solicitor General.—I thought I was entitled to refer to the view taken by those eminent persons (which was certainly somewhat wider than that which would be contended on the other side) of the terms "process, practice, and mode of "pleading." It is, however, quite enough for my purpose to refer to the Act itself. I refer to the first Common Law Procedure Act, which is founded upon that report, and we find that this is "An Act to amend the process, practice, and mode of "pleading in the Superior Courts of Common Law at West-"minster." The preamble recites, "Whereas the process, prac-"tice, and mode of pleading in the Superior Courts of Common

" Law at Westminster may be rendered more simple and speedy," and so on. The title of the Act is " The Common Law Procedure " Act, 1852," and it is said by Chief Justice Erle, and, I apprehend, correctly, that the term " procedure " is a generic term, including process, practice, and pleading, and that we may substitute " procedure" for those terms, " process, practice, and pleading." The same terms, " process, practice, and pleading," are used in the second Common Law Procedure Act, " An Act for the " further amendment of the process, practice, and. mode of " pleading in and enlarging the jurisdiction of the Superior " Courts of Common Law at Westminster." I may state that the expression " enlarging the jurisdiction " applies to the equitable jurisdiction given to the Courts. Then coming to the Queen's Remembrancer's Act, again, I find that the Queen's Remembrancer's Act, which we are now upon, is entitled " An " Act to regulate the office of Queen's Remembrancer, and to " amend the practice and procedure on the Revenue side of the " Court of Exchequer ;" and the preamble says, " And whereas " it is expedient further to regulate the said office, and to make " other provision in relation thereto, and to the procedure on the " Revenue side of the said Court." Then in all these three Acts, my Lords, under the head the terms " process, practice, and mode " of pleading," for which, I apprehend, " procedure " is a convertible term, you find proceedings relating to Error, and in some of them proceedings relating to Appeal. So it is quite clear, it appears to me, that the Legislature did not take the narrow view which will be contended for, of this term, " process, practice, and " mode of pleading," but supposed it to have a much wider application.

Now, my Lords, I will call your Lordships' attention very shortly to the proceedings in this first Common Law Procedure Act relating to Error. These provisions begin in this way : " and with respect to the proceedings in Error, be it enacted as " follows : No judgment in any cause shall be reversed or avoided " for any error " within six years.

Lord Chancellor.—The Attorney General took us through that.

Mr. Solicitor General.—I am not at all going at length through these clauses, but I am only going to observe upon them generally, and I take one or two by way of example. The clauses, no doubt, have been very fully brought to your Lordships' attention. From section 146 to section 177 we have a code of procedure relating to error. And your Lordships will find, if you analyse those sections, that by far the greater part of those proceedings are proceedings which actually take place in the inferior Court. In fact, it appears to me impossible to separate the procedure in error from the beginning of the cause unto the end. It appears to me impossible to draw a hard line of demarcation and say such a proceeding is a procedure in the Court below, and such

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a proceeding is a procedure in the Court above, and I apprehend that all those provisions may be taken as part of the "process, "practice, and mode of pleading" of those Courts in which the proceedings originate, and to which the Record finally returns.

But I wish now, dealing with this set of provisions relating to error, to suggest this question: Can it be said, if all those proceedings were struck out, that we have before us the whole of the process, practice, and pleading of the Court of Exchequer? I apprehend not. Taking process, practice, and pleading in the narrowest sense, it applies to the greater part of those provisions; taking process, practice, and pleading in their narrowest sense, in order to make the procedure on both sides uniform, it is necessary to adapt at least as much of the procedure in error as takes place in the Court of Exchequer. But if that is done, is it possible to stop there? Nothing could be more idle than to adapt the proceedings up to a certain stage, and then to stop short, and deprive the suitor of the result of those proceedings. So I apprehend it is utterly impossible in the first place, taking the strictest and narrowest sense of the words "process, practice, and pleading," to say that, putting out of the question all those provisions relating to error, you can make uniform the procedure on both sides of the Court, if a portion of its proceeding with respect to error apply to the one side, and not to the other. You clearly must, in order in the strictest sense to comply with the provisions of the Act, adapt so much of the proceedings in error, that take place in the Court of Exchequer on the Plea side to the Revenue side. But, if you do that, it is impossible to stop there, because the suitor does not get the advantage of those provisions. Therefore it appears to me that the Legislature gave this general power to the Court of Exchequer to adapt any of the provisions of the Common Law Procedure Acts, even if those provisions, *strictissimo sensu*, were not the process, practice, and mode of pleading of the Court below. The Legislature gave power to adapt all the provisions which were necessary to make the process, practice, and mode of pleading of the two sides of the Court of Exchequer uniform; and it would be utterly impossible to do that under the narrow construction of my learned friends, which would exclude all proceedings relating to error.

The same observations which I have made upon the proceedings relating to error in the first Common Law Procedure Act, apply to the proceedings relating to appeal in the second Common Law Procedure Act. The greater part of those proceedings are actually taken in the Court below. But then those proceedings, being taken in the Court below, the Legislature enacts that without which those proceedings would be fruitless, namely, that those proceedings being taken, then the Court of Exchequer Chamber and the House of Lords shall be the Courts of Appeal. But those are only sequels and necessary consequences of the provisions relating, strictly speaking, to the process, practice, and mode of pleading.

of the Courts below, and without which those provisions would be utterly useless. Therefore, my Lords, I venture to contend that it is quite impossible that the objects of the Legislature, namely, the making as nearly as possible uniform the procedure on the two sides of the Court of Exchequer, could be effected upon the narrow construction which will be contended for on the other side, but that it is absolutely necessary that this power which the Court of Exchequer have exercised should be entrusted to them in order to carry into effect the object of the Legislature.

Now, my Lords, I will only advert, and that very shortly, to some of the other provisions in the Queen's Remembrancer's Act, which have been supposed to be at variance with this view. And I understand that the argument on the other side will be, that because the Legislature in certain other sections of this Act expressly enacted that certain provisions of the Common Law Procedure Acts should be applied, it is therefore probable that if they had intended the appeal provisions also to be applied, they would have said so. That I understand to be the argument.

My Lords, I may reply to that, in the first place, that it is quite clear that the Legislature have not determined, with respect to all the provisions of the Common Law Procedure Acts, whether they should be adapted or should not; because they have left the adaptation of some, at all events, to the discretion of the Court of Exchequer; for if this were not so, section 26 would have no meaning at all. And I apprehend that it is not at all unreasonable to suppose that the Legislature may have seen their way to a certain point, but may not have seen their way beyond it. They might have seen their way to the adaptation of certain provisions where a case is stated by consent, or such as relate to the amendment of the Record. But with respect to such a question as whether the appeal provisions should or should not be applied to the Revenue side of the Court of Exchequer, the proceedings on that side being to some extent anomalous, the Legislature may have felt a great difficulty, and thought that that question would be better solved by the Barons of the Exchequer, who were conversant with the practice of their own Court. It therefore appears highly probable that the Legislature should leave this question to them.

But, my Lords, if those sections of the Act are further examined, I think it will be found that I have another answer to any argument which may be founded upon them, which, in fact, has been put forward by the learned Attorney General; namely, that in almost each of these cases, if not in all of them, it is not difficult to show that there were special reasons why the Legislature should expressly enact what they have done. With respect to a bill of exceptions, for example, it would not have been enough to say, The Court of Exchequer shall have the power of applying the provisions of the Common Law Procedure Act to the Revenue side. That would not have given a bill of exceptions, because the Common Law Procedure Acts had nothing to do

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with a bill of exceptions; it was therefore necessary to give a bill of exceptions by express enactment. That explains the special enactment with respect to a bill of exception. And then, that having been done, the subject having had given to him an appeal to a Superior Court, (for the proceeding by a bill of exceptions is an appeal to a Superior Court,) all that the Legislature have left, as I submit, to the Barons of the Exchequer, is this: to determine (the suitor having the right to go to a Court of Error) whether he should have the right of going by another way. The Legislature give him the right to go to the Court of Exchequer Chamber, and to go to your Lordships' House by means of a bill of exception. It was said, and will be said, how very improbable it is that the Legislature should entrust to the Barons of the Exchequer the power of forming a new Court of Appeal. I answer that in substance they do not form any new Court of Appeal at all; that the Court of Appeal is given to the subject by the 20th section; and that the right of appeal is given upon certain questions, namely, questions of law. The Court of Exchequer do not create a Court of Appeal. They do not give a right of appealing upon any grounds which did not exist before; but all that they have done by those orders is to say to the suitor, "You having a right to go to the Court of Error upon "certain grounds, we make rules which will enable you to go "thither in another way, shorter and more convenient."

Lord Chancellor.—They bring within the jurisdiction of the Court of Appeal matters which were not previously within their jurisdiction.

Mr. Solicitor General.—In one sense they do, my Lord, but not in another. I apprehend that the questions for the Court of Exchequer Chamber, when a matter comes before them, whether by way of appeal or by a bill of exceptions, are precisely the same. A bill of exceptions can only be tendered for the misdirection of the judge on matters of law, and an appeal will only lie for the misdirection of the judge on matters of law. An appeal lies only upon those points upon which a bill of exceptions lies, and that is adverted to by Mr. Justice Willes at some length in his judgment. So that I apprehend no new ground of exception is given to the direction of the Court below, and no new Court of Appeal is in substance created. But what has been done is this: to say to the suitor, You have a right to go to the Court of Error in a roundabout way, and we will give you the right to go thither in a shorter way. That, I submit, is all that the Court of Exchequer have done; and it appears to me not at all improbable, or at all unreasonable, that the Legislature should have entrusted to the Court of Exchequer the determination of that question, whether the shorter road should or should not be open to the suitor.

So much has been said by the learned Attorney General in his exhaustive argument upon the other sections of the Act that I will only refer to them in a very few words.

With respect to section 19, the Legislature has gone so far as to abolish the writ of error, and to enact that the proceeding to error shall be a step in the cause. But then it goes on to say, "and shall be taken in manner and subject to such terms and "conditions as to giving bail or security as may be directed by "any rule or order made by the Barons." It was necessary to direct this, because, under the Common Law Procedure Act, there were provisions requiring the party bringing error to enter into recognizances with sureties, and so on. It probably was felt that that would not apply to the Crown, and that it would be wrong, and almost absurd, to require the Attorney General to enter into recognizances. If, therefore, the Barons of the Exchequer had had merely the power of adapting the provisions of the Common Law Procedure Act, that would not have done, and it was necessary to give them a power to change them; and it is for the purpose of giving them the power, not to adapt, but to change, that this section became necessary. And then, as has before been pointed out, and as is stated in the judgment of the Lord Chief Justice of the Common Pleas, the Legislature having gone so far as to abolish the writ of error, it is left to the Barons of the Exchequer to determine what shall be done afterwards; that is to say, to substitute for the processes of the assignment of error, joinder in error, and the old procedure in error, the new and more convenient procedure which has been introduced by the Common Law Procedure Acts. And in pursuance of that power, given partly by the 19th section, but partly also by the 26th section, the Barons of the Exchequer have made the orders to which your Lordships' attention has been called, whereby they have regulated the proceedings in error.

Lord St. Leonards.—Would they under section 26 do, without the latter portion of the previous section, what they may now do or might do under that section? Do you say that without the power expressly annexed to section 19 they might have done under section 26 what it authorized them to do?

Mr. Solicitor General.—I apprehend that, without the power given in section 19, it would have been impossible for them to make any regulations relative to bail and security, which would not apply equally to the Attorney General, and to the subject. They would have had only power to apply the provisions of the Common Law Procedure Act, and it is under section 19 that they have the power of varying those provisions, and changing them, if adaptation only without change had been required. And I apprehend that section 26 would be enough for that purpose. It would certainly appear that the Legislature, by section 26, under which the orders were made upon this matter, contemplated the judges of the Court of Exchequer dealing with matters beyond the four walls of their Court. I do not mean to say that the argument is conclusive, but it appears to me to be some argument against the notion that the Legislature intended to confine their power to dealing with what took place within the actual walls of their own Court.

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Then, my Lords, the reasons why the other sections were specially enacted, I think, have been already explained. Section 15 relates to proceedings in the Court of Exchequer by writ of summons under the Succession Duty Act, and gives an appeal by express provision with respect to a proceeding of that kind, because the Common Law Procedure Acts would not apply to it, they applying to actions; and the same observations would apply to sections 12, 13, and 14.

Now, my Lords, as I before observed, I do not purpose to trouble your Lordships with any very lengthened argument upon this matter, which has been, and will be again, no doubt, so fully discussed. I will not go into collateral subjects, which do not directly bear upon the matter. But I submit to your Lordships, upon the construction of the 26th section, which in terms gives the power to adapt any of the provisions of the Common Law Procedure Acts, that the learned Judges have the power of adapting any of the provisions of the Common Law Procedure Act which they think fit, and which are necessary for the purpose which they are authorized to effect; that that purpose cannot be effected if you allow all of the provisions with respect to appeal and error to apply to one side of the Court of Exchequer, and not to the other. If we look at the intentions of the Legislature, so far as they can be collected from the other sections of the Act, I apprehend that the policy of the Legislature was to extend the right of appeal. And the Legislature did extend the right of appeal to summary proceedings on the Revenue side, showing that they desired, as far as possible, to give the subject a short and efficacious remedy. It was necessary expressly to enact provisions with respect to bills of exceptions and other matters; but when they came to the question as to whether the remedy by appeal should be allowed to the suitor in proceedings other than summary ones instead of that by bill of exceptions, then the Legislature felt that it would be safer to entrust the discretion to decide whether this should be done to the Court of Exchequer, than to exercise it themselves. I submit, therefore, to your Lordships that the Court of Exchequer have properly exercised the discretion which it was the intention of the Legislature to confide to them.

Adjourned to Monday next at 11 *o' clock.*

ARGUMENT—*continued.*

Monday, 14th March 1864.

Sir Hugh Cairns.—My Lords, I have the honour of appearing before your Lordships in this case on behalf of the Respondents, who are the Defendants in the action which was brought in the Court of Exchequer. I think, my Lords, it will enable me to submit to your Lordships the observations which I have to offer more clearly if I take leave, in the first instance, to remind your Lordships exactly what has occurred with regard to the proceedings in this cause.

My Lords, the trial took place before a jury, and a verdict was returned for the claimants against the Crown. At the trial, it was stated on behalf of the Crown, that they proposed to tender a bill of exceptions to the ruling of the learned Judge; and two points in particular were mentioned at the trial as being points upon which that bill of exceptions would be tendered. Some dispute arose, with which your Lordships need not be troubled, as to the precise effect of the ruling of the learned Judge upon those two points. But, my Lords, a bill of exceptions was prepared, and it was under consideration, having been handed over to the claimants, and while it was under their consideration they were served with a rule obtained from the Court of Exchequer for a new trial, embracing points of fact, and embracing also the points of law which would be raised in the bill of exceptions. That rule was argued, as your Lordships are aware, in the Court of Exchequer, and the result was that it was discharged. Then, my Lords, we were served with notice of an appeal on behalf of the Crown, and we were given to understand that that appeal was to be brought in pursuance of certain general orders of the Court of Exchequer which were made on the 4th of November, that is, on the third day of Michaelmas Term last, upon the application of the Crown.

Now, my Lords, I desire, not merely on my own behalf, but on the behalf of those whom I represent, to state in the clearest way that we never could for a moment entertain a doubt, and that nobody could for a moment entertain a doubt, that the very learned Judges of the Court of Exchequer, in making those rules, were actuated by no considerations except considerations of justice, expediency, and propriety. But, on the other hand, I cannot help saying and submitting to your Lordships that for a Court, after a trial has been had—after one of the litigant parties has been in possession of the verdict—to make, at the instance of the other litigant party, general orders of the Court, apparently in the exercise of a discretion reposed in the Court,—orders general in their terms, and applying to all cases, but confessedly and avowedly made in order to meet a particular case, and to give facilities for an appeal in that case, and to neutralize or to set aside the verdict—is a precedent which

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is open to very grave misconstruction and to very serious inconvenience.

Lord St. Leonards.—Did not the argument begin on the very day on which the orders were made?

Sir Hugh Cairns.—The orders were made on the afternoon of the 4th of November, and the rule nisi was applied for and granted on the following morning.

My Lords, I do not desire to pursue this subject, but I venture to say that my learned friends will not be able, at any period of our legal history to which one can look back with satisfaction, to point to a similar instance of general orders being made. I do not ask what would be done, supposing that a private suitor went to the Court, and begged the Court, in the exercise of its discretion, to make general orders to facilitate his appeal, because I am unable to picture to my mind the fact of a private suitor adopting that course.

Now, my Lords, it was not unnatural that we should look with some anxiety and some minuteness at the orders which were made under those circumstances. And I will, in the first place, ask your Lordships to glance for a moment, because it arises in the preliminary part of the case, at these orders, and to see what it is that on the face of these orders is proposed to be done. The orders are printed at page 191,* and have been already read at length. But may I be allowed to call your Lordships' attention to the introductory words of the orders, and to make a remark upon them. The order runs in this form:—"In pursuance of "the provisions contained in the 26th section" of the Queen's Remembrancer's Act, "it is ordered that the following provisions "of the Common Law Procedure Act, 1854, be extended, "applied, and adapted to the Revenue side of the Court of "Exchequer, and also that the following rules as to giving bail "in cases of appeal shall be in force on the Revenue side of the "Court of Exchequer." My Lords, the embarrassment in this case is not as to where one can put one's finger upon error, but upon what part of the case one can put one's finger, and say that the proceedings have been rightly conducted. Let me ask your Lordships then to consider the words which I have read. The Court says (I will presume now that they have got the power to make these orders), Let the following provisions of the Common Law Procedure Act be extended, applied, and adapted to the Revenue side of the Court of Exchequer. I am assuming now that there was the power, as the Crown desire to put it. The Queen's Remembrancer's Act says to the Court of Exchequer, You, the Barons of the Court of Exchequer, may extend, apply, and adapt any of the provisions of the Common Law Procedure Act to the Revenue side of the Court of Exchequer. What is the meaning of that? The meaning, my Lords, I apprehend is this: that if it is desired to exercise that power, the learned Judges of the Court of Exchequer must

* Vide Appendix to Report of "*Argument in the Exchequer Chamber*," p. 1.

do one of two things; they must either say, Such and such a provision of the Common Law Procedure Act, as it stands, is applicable and shall be applied to the Revenue side of the Court of Exchequer; or else they must define in what manner, being inapplicable in its express words, it is to be made applicable, and to be adapted so as to fit into the practice of the Court of Exchequer. But the learned Judges have not even exercised the power according to their own construction of the Act. They have thrown wide into the middle of the Court these orders, and they have told the suitors of the Court, delegating their power even to the suitors of the Court, to adapt for themselves a number of the provisions of the Common Law Procedure Act, in whatever way either argument, or whim, or caprice, or any other faculty which the suitors may possess, will lead them to adapt them. It will be very material to consider this when we come to look at one or two of the provisions in question. Now, my Lords, let me suppose a case. Suppose it had been thought fit by the learned Judges to say, The whole of the Common Law Procedure Act shall be dealt with in this way; and suppose they had made a general order thus:—We do hereby order that the whole of the Common Law Procedure Act shall be hereby adapted to the Revenue side of the Court of Exchequer. Is that an order within the meaning of their own construction of the Act of Parliament? Did Parliament mean that they were to do that, and that under the word "adapt" they were simply to throw down the Acts of Parliament and say, Let those who have to conduct the litigation in question, let the litigant parties or their counsel or their advisers, judge for themselves how it is to be done. We discharge our duty by saying, Take the Common Law Procedure Acts; make the best of them you can; and then you may have an argument, when the question legally arises whether a particular provision is applicable to the Revenue side of the Court.

My Lords, I pass over for the present the first and second rules. I shall notice them again before I conclude my argument; and I will take leave to submit to your Lordships some observations upon the retrospective character which is attempted to be put upon those rules, with reference to the present case. That is a question of construction, not of power. I pass over those sections at present, and call your attention to the third rule, upon which some observations have already been made. It is perfectly apparent that in the precipitancy with which these rules were made, the framer of the third rule failed to appreciate what the meaning or purport of the Common Law Procedure Act was. The introductory words would have led us to expect that we should have found that the provisions of the Common Law Procedure Act of 1854 would have been set out *in verbis*, because the provisions begin thus: "It is ordered that the following pro-
" visions of the Common Law Procedure Act, 1854, be extended,
" applied, and adapted to the Revenue side of the Court of
" Exchequer." Then we find that the third rule runs thus:

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"The Court of Error, the Exchequer Chamber, and the House "of Lords, shall be Courts of Appeal for this purpose." The Common Law Procedure Act had the words "for the purposes "of this Act," that is, the Common Law Procedure Act. Now those words in that Act were perfectly intelligible, perfectly sensible, and perfectly necessary. Why? Because the Common Law Procedure Act had to deal not merely with errors and appeals from the Court of Common Pleas, the Court of Queen's Bench, and the Court of Exchequer, but it had also to deal with errors and appeals from the Court of the Duchy of Lancaster, and the Court of Durham, and it had also to deal with appeals from all Inferior Courts in England, provided they were Courts of Record proceeding according to the principles of the Common Law; for Her Majesty, by Order in Council, might at any time extend the provisions of the Common Law Procedure Act to one of those Inferior Courts. For all those Courts the Court of Queen's Bench was the Court of Appeal. Therefore the Common Law Procedure Act said, and rightly said, speaking of these different tribunals: The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for the purposes of this Act. But those who framed this rule, failing to observe what the meaning of the words was, have altered the words at the end of the clause, and, in place of "for the purposes of this Act," have substituted the words "for this purpose," meaning for the purpose of the appeal created by those rules; and, of course, in using the words "Court of Error," they are constrained to use them in the sense in which they are used in the Common Law Procedure Act, for this professes to be a repetition of the words and meaning of the Common Law Procedure Act. And they have therefore laid down this rule, that the Court of Error, meaning, as in the Common Law Procedure Act it means, the Court of Queen's Bench, Court of Exchequer Chamber, and the House of Lords, shall be Courts of Appeal for this purpose.

My Lords, I now proceed to take the fourth rule. I am only calling your Lordships' attention at present to what appears upon the face of the rules themselves. The 4th Rule, in place of being one of the provisions of the Common Law Procedure Act, which we are led to expect by the introduction of words, is an alteration again of the Common Law Procedure Act, because it introduces the words "the Queen's Remembrancer," which are not in the Common Law Procedure Act. They attempt, therefore, by inserting words in one particular rule, to adopt the Common Law Procedure Act to the peculiar circumstances of the Revenue side of the Court of Exchequer, and yet we have hardly read that rule before we go on to the 5th, and find that so little attempt was made to adapt the rules that the 5th rule runs thus: "The appeal herein-before "mentioned shall be upon a case to be stated by the parties, "and in case of difference to be settled by the Court, or a Judge "of the Court, appealed from," as if there might be a number

of Courts from which an appeal might come. While the preceding rule had fixed, by the introduction of the words "Queen's Remembrancer," the only Court which was supposed to be within the contemplation of these rules, the 5th rule returns to the precise words of the Common Law Procedure Act, and speaks of any Court which might be appealed from, or a Judge of any Court which might be appealed from; the exact words are "a "Judge of the Court appealed from."

My Lords, let me proceed, passing over the 6th, 7th, and 8th rules for the present, to the 9th rule. I find there again this same way of dealing with the Common Law Procedure Act: "Upon an award of a trial *de novo* by the Court, or by the "Court of Error, upon matter appearing upon the record, error "may at once be brought." The Common Law Procedure Act had "any one of the Superior Courts." There it was "upon an "award of a trial *de novo* by any one of the Superior Courts." There again the framers of the rule seem to have attempted to alter the rules of the Common Law Procedure Act, so as to fit the case to the Court of Exchequer alone.

But perhaps the most singular rule of all is the 11th: "Upon "motions founded upon affidavits, it shall be lawful for either "party, with leave of the Court or a Judge, to make affidavits "in answer to the affidavits of the opposite party upon new "matter arising out of such affidavits, subject to all such rules as "shall hereafter be made respecting such affidavits." These are the very words of the Common Law Procedure Act; but in the Common Law Procedure Act, "subject to all such rules as shall "hereafter be made" meant "subject to all such rules as shall "hereafter be made by eight or more Judges of the three Supe-"rior Courts at Westminster." But the eight Judges of the Superior Courts at Westminster had no right whatever to make rules for the government of the Revenue side of the Court of Exchequer. Therefore here again we have that which is really insensible. And again, my Lords, we have at the close that which I shall observe upon before I have done, although I will postpone my remarks upon it, with your Lordships' permission, at present, "The foregoing rules shall come into operation and "take effect forthwith, and apply to every cause, matter, and "proceeding now pending."

Now, my Lords, in the first place I should ask your Lordships to consider the particular character of the proceeding which has been termed in these rules and in the Common Law Procedure Act an appeal. It is well known to all your Lordships that before the Common Law Procedure Act, 1854, passed, there was nothing as applicable to the proceedings or to the judgments of any of the Supreme Courts of Common Law which was called or could be called an appeal.

Lord St. Leonards.—How were the rules of the Common Law Procedure Act directed to begin? When were they to begin to operate?

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Sir Hugh Cairns.—If your Lordships will forgive me I propose to ask your Lordships to consider the point with a view to judge how far those rules could have been made retrospective before I have done, and I think it would be convenient if your Lordships will allow me to defer what I have to say upon it until that time. There was no proceeding before the year 1854 known as an appeal. The decision of the Judges of our Superior Courts of Common Law were final, subject to this, that for error upon the record a writ of error might be directed to the chief of the Court in which the error was said to have occurred, and upon that writ of error the record might be brought into the Court which had a right to review the decision, and, if error was found, they might be made to set the record right; subject to that exception there was no proceeding whatever known as an appeal.

Your Lordships cannot have failed to see the very considerable inconsistency which exists in the argument on behalf of the Crown in regard to this appeal. At one time they tell you this is the most novel, the most excellent, and the most expedient mode of setting right miscarriages in the Courts of Common Law that ever was devised. It is perfectly novel, they say, and my learned friend reads to you passages out of Blackstone's Commentaries, and the notes of Sir John Coleridge upon those Commentaries, and he shows what nobody can deny, namely, the inconvenience of the old methods of bringing error, and the desirability of having a new, fresh, and different mode of appeal. But hardly has my learned friend conducted your Lordships through that part of the argument, than he turns round and says, But after all it is really the same thing; a bill of exceptions and a writ of error are really the same thing as this mode of appeal; everything that can be done by this mode could be done by the other; there were some technicalities of detail that sometimes made the other inconvenient; but in substance this is the same as it was before.

Now, I accept the first statement of my learned friend, and venture to demur to his second statement. I will state to your Lordships three cardinal points of difference which are to be found in the appeal as constituted by the Common Law Procedure Act as distinguished from anything that was known in the shape of error in the Courts of Common Law before. I do not mean to say that there are not many more, but there are certainly three cardinal points. The first is, that there is in this mode of appeal the introductiou of a new court—of a third court, through which the cause is made to pass. I mean, when I say a court, a tribunal to judge a question upon appeal. By error or by bill of exceptions you went from trial at Nisi Prius to the Exchequer Chamber, and from the Exchequer Chamber to the House of Lords. By this mode of appeal the one suitor has the chance and the other suitor has the burden of a further tribunal through which the proceedings must pass, namely, the

Court in Banco, in which the cause had its origin. There is here the trial at Nisi Prius, the argument before a full Court in Banco, then the appeal to the Exchequer Chamber, and then the appeal to the House of Lords. The point of difference is of the very greatest magnitude when you come to look upon the chances and risks of the appeal.

The next point of difference which I will mention is this: upon a bill of exceptions, from the very nature of the case, nothing could be brought under review in the Exchequer Chamber but a point taken, an objection made at the trial. A party had to determine at the trial whether he had an objection to make, and he had to state it. If he did not state it and take the objection, then he was barred and precluded from taking it afterwards, and upon that point, at all events, the proceedings were final. But what is the case upon an appeal for misdirection? Of course I agree that as to any matter which might be cured by the introduction of further evidence the Court in Banco would not listen to an objection which had not been taken at the trial. But in general, upon a misdirection of a Judge in his charge to the jury, you can have a rule for a new trial, and go to the Exchequer Chamber and the House of Lords without having raised the points at Nisi Prius, as you would have had to do for a bill of exceptions.

Lord St. Leonards.—Are you now referring to these orders?

Sir Hugh Cairns.—I am speaking now upon the Common Law Procedure Act of 1854, to indicate the general nature of an appeal. The third point of difference would be this. Notwithstanding what your Lordships have heard read from the judgments of one of the learned Judges, I take leave to say, with great respect, subject to your Lordships' much better judgment, that there is a most marked distinction as to non-direction upon a motion for a new trial and upon a bill of exceptions. I quite bow to what was said by Mr. Justice Willes, that you may suppose a case of an exception taken for non-direction, that is, you may suppose a case in which *ex necessitate* a Judge on a trial ought to direct the jury upon the point of law, and may be called upon to direct the jury upon a point of law; and then, if he refuses, an exception may be raised, stating that the Judge was called upon to direct the jury upon a point of law, and refused to do so. That may be so, but it is within your Lordships' experience, I am sure, that you may come for a motion for a new trial to the Court in Banco, and say to them, without challenging any particular statement of law which may have been made by the Judge, "We appeal to the "Court in Banco whether there has been that general exposition "of the law which might be fairly expected from a Judge in his "charge to a jury." And if the Court in Banco are of that opinion, you may ask for a rule for a new trial; and if they are not of that opinion, you may have an appeal, and yet in this case you could have had no bill of exceptions. There is, therefore,

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an appeal for non-direction as well as an appeal for misdirection.

There are, therefore, my Lords, at least these three points. I will not say that there might not be other points which persons conversant with Common Law, which I am not, might be able to point out; but those are quite sufficient to justify my praying in aid one part of my learned friend's argument, where he said that the Common Law Procedure Acts conferred a new, a highly important, and distinctive mode of appeal which was never possessed before.

Now, my Lords, concluding these observations, I will ask you to allow me to make the remarks which I have to make upon the Queen's Remembrancer's Act, touching first upon the earlier sections in point of order. The first section which has to be referred to is the 9th. I only refer to that, for this purpose: that that is a section which refers to a particular clause of the Common Law Procedure Act of 1852. It does not leave it in doubt or uncertainty whether that section is to be made applicable or not to the Revenue side of the Court of Exchequer; but it at once lays down that it is to extend to all suits and proceedings on the Revenue side of the Court of Exchequer. The section so applied is, perhaps, one of the most important sections of the Common Law Procedure Act. It is that section which enables amendments to be made at any time. It is in these words: "It shall be lawful for the Superior Court of Common "Law, and every Judge thereof, and any Judge sitting at Nisi "Prius"——

Lord Kingsdown.—What Act is that to which you are referring?

Sir Hugh Cairns.—The Queen's Remembrancer's Act, the 22nd and 23rd of the Queen, which, as your Lordships know, is printed in the Appendix.* I was pointing out to your Lordships that the 9th section of that Act takes the 222nd section of the Common Law Procedure Act of 1852, and applies it at once to the Revenue side of the Court of Exchequer. The section in question is one which enables the Superior Courts, and any Judge sitting at Nisi Prius, "at all times to amend all defects and "errors in any proceeding in civil causes, whether there is any-"thing in writing to amend by or not, and whether the defect "or error be that of the party applying to amend or not; and "all such amendments may be made with or without costs," and so on. The remark one makes upon reading that 9th section is this: You see here the key to the proceedings of the Legislature. It finds a very important provision in the Common Law Procedure Act with respect to the amendment of practice; it takes that section, and does not leave it to any Court, or to the rules that may be made for the pleading and practice of the Court, but it treats it as so novel and important an addition to the practice of the Common Law, that it bodily

* Vide Appendix, p. 5, to Report of "*Argument in the Exchequer Chamber*" (vol. 3.)

incorporates it into the practice of the Superior Court which it is dealing with, and also into the trials at Nisi Prius.

Then, my Lords, I will not trouble your Lordships by reading the 10th and 11th sections; for they were read at full length on Friday, and your Lordships have them sufficiently in your minds. Those sections relate to a special case, to be stated by consent of the parties, and by the order of a Judge. Now, of course, the observation to be made upon that, in our view of the argument, is this: You find here the Legislature anxiously dealing with the case of the improvement of the proceedings with reference to the recovery of the revenue. It thinks it right to provide that there shall be these modes of stating a special case. It thinks it right to give an appeal upon those points, and it points out the Court of Error to which that appeal shall be brought, and gives instructions to the Court of Error with reference to that appeal. You have, therefore, the Legislature dealing expressly with the mode of reviewing the judgment in that case.

Now, my Lords, what is the observation made upon this section by my learned friend, repeating the comments of Mr. Justice Willes? Mr. Justice Willes says this: I agree that I am bound to suggest some reason why Parliament, in reference to special cases and appeals, should have so anxiously and particularly provided the 10th and 11th clauses, and not left it to the regulation of the 26th clause, and to the Judges of the Court. But he says, I have got a reason, and my reason is this: I find that these special cases cannot be stated without the consent of the parties. That includes, therefore, the consent of the Attorney General. Therefore, says Mr. Justice Willes, Parliament saw that the interests of the Crown were sufficiently protected there, because the Attorney General could refuse his consent.

But, my Lords, with great submission, that is no answer at all. Why might not the whole of that have been left to the discretion of the Court of Exchequer, as well as the case which the Crown says has been left to them of an appeal? Why might it not have been left to the discretion of the Court of Exchequer to make, in the shape of a rule, a provision just of the same description as the provision which we find in the 10th and 11th clauses? Might not the Court of Exchequer have said by their rule, The parties may by consent and the order of a Judge state a special case, and then there may be an appeal from that special case? In truth, I think the answer which has been given by Mr. Justice Willes is very strongly in our favour in that point of view, because the learned Judge admits that he must suggest some reason for the express enactment of these 10th and 11th clauses. He says, I agree that that is a proper and plausible argument, but I will tell you the reason why these clauses were expressly mentioned by the Legislature, and then his reason turns out to be no reason at all, as I humbly submit to your Lordships.

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Then, my Lords, I will take together from the 12th to the 15th clauses. Those are clauses which are, I agree, entirely new —not taken from the Common Law Procedure Acts, but giving, and, as my learned friends say justly, most anxiously giving, a right of appeal in the case of decisions under the Succession Duty Act, and under the Legacy Duty Act. But the observation upon those sections, I venture to think, has not been answered, because the observation upon them is this: We concur with you that in those clauses the Legislature has shown the greatest and most careful anxiety to give a right of appeal upon decisions under these Acts of Parliament. But if that is so, if any argument is to be deduced from that at all, surely the argument is this: if the Legislature has shown this anxiety for giving appeals in proper cases, would it not, if it had thought that upon motions for new trials there ought to be an appeal of the kind, pointed out in the Common Law Procedure Act, would it not *pari ratione* have expressly and actually granted that right, and not have left it to contingency, or to the exercise of the discretion of the Judges of the Court?

Then, my Lords, I will take section 16 of the Queen's Remembrancer's Act. What do we find there? I find that in addition to extending the powers of the Act 1st of William IV., chapter 22, the Act of Parliament takes the 46th, 47th, 48th, and 49th sections of the Common Law Procedure Act, 1854, the very sections which begin immediately after the sections giving the right to appeal upon motions for a new trial, for the latter sections run up to the 45th. Parliament takes the very sections immediately following those sections, and does not leave them to any question of the discretion of the Court, or the accident of general orders; but it at once says that these are sections fitted to be incorporated into the practice of the Court of Exchequer, and it does incorporate them accordingly. Those are sections relating to discovery and to the administration of interrogatories, and the examination of witnesses in the course of a cause; they are entirely new and of a most important character.

Then, my Lords, I come to section 17, and to an argument of Mr. Justice Willes, which was repeated before you on Friday last. I cannot help thinking that that argument will be found to be entirely fallacious.

Lord Chancellor.—The sections mentioned in the 16th section of the Queen's Remembrancer's Act are taken from the Act of 1852; but the section giving the power of appeal is in the Act of 1854.

Sir Hugh Cairns.—I beg your Lordship's pardon; it is in the Act of 1854. I think your Lordship will find, if you look just about the middle of section 16, it expressly says: "The pro- "visions contained in the 46th, 47th, 48th, and 49th sections "of the Common Law Procedure Act of 1854."

Lord Chancellor.—The marginal note says the 15th and 16th Victoria, instead of the 17th and 18th.

Sir Hugh Cairns.—Now, I will pass to clause 17. I hope I shall not be guilty of very great presumption when I venture to say that Mr. Justice Willes has entirely fallen into an error upon this point. What does the 17th section say? "From and after "the passing of this Act it shall be lawful for all Justices of "assize, and they are hereby authorized and empowered on their "respective circuits to try suits and proceedings pending on the "Revenue side of the Court of Exchequer, and to proceed thereon "in like manner as they can or may do in respect of causes "pending on the Plea side of the said Court, and it shall not be "necessary hereafter to issue any commission from the Revenue "side of the said Court for that purpose." What is the argument upon that clause? Mr. Justice Willes says the Nisi Prius Court is a Court as distinct from the Court of Exchequer as the Court of Exchequer Chamber can be said to be distinct from the Court of Exchequer. Therefore he says, If you limit the power to make rules in section 26 to the Court of Exchequer proper, the power to make rules in section 26 cannot even extend to the Court in Nisi Prius. Therefore he says, Look at what the consequence will be; you will not be able in Nisi Prius proceedings to have any of the benefit of the enactments with regard to Nisi Prius in the Common Law Procedure Acts.

Let us try that position. What are the enactments with regard to Nisi Prius in the Common Law Procedure Acts? They are threefold. The first and one of the most important is the power of amendment, the second is the rules with regard to evidence taken *in cumulo*, and the third is the power of regulating the jury process. I defy my learned friends to point out, in the whole of the Common Law Procedure Act, any provision that does not come under one of those heads. Now let us see how that stands with regard to the amendment of proceedings. I pointed out to your Lordships that section 9 has taken that section up and dealt with it, and expressly extended it to the proceedings under the Queen's Remembrancer's Act.

Lord Kingsdown.—What are the three points?

Sir Hugh Cairns.—First, the power of amendment of proceedings; secondly, the rules as to the evidence, and, thirdly, the provisions as to jury process. The 9th section deals with amendments and extends specifically, not by way of rule but by way of enactment, every provision of the Common Law Procedure Act to causes originating on the Revenue side of the Court of Exchequer, to all suits upon the Revenue side of the Court of Exchequer.

Then, my Lords, how is the matter as to evidence? Your Lordships will find that in the Common Law Procedure Act of 1854, which contained the enactments as to evidence, there was this clause, the 103rd, "the Enactments contained in "section 19;" then they are all repeated down to 32 of this Act, "shall apply and extend to every Court of Civil Judicature "in England and Ireland,"—so that they are all extended.

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Lord Chancellor.—What is the range of the words "Court of "Civil Judicature?"

Sir Hugh Cairns.—I apprehend, my Lord, that it must be everything which is not criminal. And, my Lords, I may appeal to practice upon that point. No person has ever suggested that anything ought to be done with regard to extending, by way of rule the rules of evidence; and I believe that in the very case now at your Lordships' bar we tried the case upon the rules of evidence, so far as they were altered by the Common Law Procedure Act.

Lord Cranworth.—Do those clauses you mentioned as referred to in clause 103 embrace the regulations contained in that Act as to the mode in which counsel shall address the Jury?

Sir Hugh Cairns.—I think they do, my Lord.

Lord Cranworth.—In one of the Acts, I think in the Act of 1854, there are clauses as to the right of reply, and regulations of that sort. Are they among them?

Sir Hugh Cairns.—I think so, my Lord. I am not quite sure.

Lord Chancellor.—The 18th section has reference to the address to the Jury, and this begins with the 19th?

Sir Hugh Cairns.—Yes, my Lord. I can answer the question which was put to me. They are not embraced, because we who are familiar with the Court of Chancery know that the provisions as to evidence proper are applied there; but we do not look to the clauses which deal with the addresses of counsel.

Lord Chancellor.—The 103rd section begins with the 19th clause, and that was the 18th.

Lord Chelmsford.—The Attorney General has his right of reply, of course.

Sir Hugh Cairns.—Yes, my Lord. Now, my Lords, as to the jury process. Let me ask you to look again at clause 17, and see whether there can be any doubt that whatever rules as to the jury process may prevail in Nisi Prius, under other Acts, this Revenue cause must be tried under this section exactly by these rules. Because what is to be done? All justices of assize are authorized "to try suits and proceedings pending on the Reve-"nue side of the Court of Exchequer, and to proceed thereon "in like manner as they can or may do in respect of causes "pending on the Plea side of the said Court." It is to be done as part of the general business at Nisi Prius; and whatever may obtain for the time being as a rule with regard to Nisi Prius for the jury process, or anything of the kind, the same is to prevail with regard to Revenue cases. Therefore I think Mr. Justice Willes' argument entirely falls to the ground; and there is no need for supposing that the 26th section is to be resorted to, in order to extricate the Revenue side of the Court of Exchequer from incapacity to have its causes tried at Nisi Prius under the rules of the Common Law Procedure Act.

Now, my Lords, I come to the next section, the 18th—and to the 19th, which is to be taken in connection with it. Those are

the sections which relate to error, properly so called. There again I desire to apply to those clauses the argument of Mr. Justice Willes, and I cannot help feeling a great satisfaction in thinking that the more we investigate those arguments, which were brought to bear upon the question with that ingenuity and acuteness which always distinguish that learned Judge, the more utterly will they be found untenable, and indeed to recoil upon the construction they were meant to support. I will present to your Lordships, as fairly as I can, the arguments which Mr. Justice Willes founds on the 18th and 19th sections. He had to deal with this consideration, which could not fail to strike any one who read the Act for a moment. He found that the Queen's Remembrancer's Act was here taking up the case of error, properly so called, and was actually applying to the case of error, properly so called, the very provisions of the Common Law Procedure Act ; and he felt, as of course he must feel, that there arises from that this argument : Why should Parliament deal with that which embraced a very large section of the modes in which miscarriages can be reviewed, and why should it in doing so take up and deal with those, and leave other similar proceedings to be dealt with by the rules of the Court of Exchequer? Mr. Justice Willes' answer is this : He says that the matters embraced in sections 18 and 19 could not have been left to rules to be made under section 26.

Lord Wensleydale.—What page is that?

Sir Hugh Cairns.—I will refer your Lordship to it in one moment.

Lord Chancellor.—I think it is page 177.*

Sir Hugh Cairns.—Yes, my Lord. I will take leave to read it; it is between letters G. and H. He says: "the 19th section "is one which requires a remark." The learned Judge passes over the 18th section, and says nothing at all about it. "It is "the section abolishing a writ of error, and then it goes on to "enact 'that the proceeding in error shall be a step in the cause,'" it should be "a proceeding *to* error,'—'and shall be taken in "'manner and subject as to such terms and conditions as to "'giving bail or security as may be directed by any rule or "'order made by the Barons.' Why? Because the provisions "of the Common Law Procedure Act following the Statute of "Elizabeth were not applicable to the cause of the Attorney "General, because it was thought no doubt an absurdity that "the Attorney General should enter into a recognizance, or that "any security should be given by him ; and accordingly it was "necessary that there should be rules by which the law appli-"cable to parties should be modified; and that to me seems "quite a sufficient reason why this provision as to the abolish-"ing of a writ of error should be specially introduced into the "Act."

* Vide p. 70 of Report of "*Argument in the Exchequer Chamber*" (vol. 3.)

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Now, my Lords, I take that, and I think I fairly take it, as an admission by Mr. Justice Willes that without that provision rules as to proceedings in error could not have been made under section 26, and therefore it was, as the learned Judge says, that section 19 was introduced,—it provided that the proceeding to error should be a step in the cause, and might be taken in manner and subject as to such terms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons under this or any other Act or Acts of Parliament authorizing the same. The argument, therefore, your Lordships will see is this,—that that would not have affected the case of the Attorney General—the Attorney General would still have to give bail,—if it had been left to section 26 alone, if the Court of Exchequer had been left to make rules under section 26 alone, to adapt the provisions of the Common Law Procedure Act, they would have been obliged to follow strictly the rules of the Common Law Procedure Act, and the Attorney General would have had to give bail. Therefore a special provision was made as to error in order that it might not be incumbent upon the Court of Exchequer in making rules as to appeal to force the Attorney General to give security. Is that true? If that had been the only reason why section 26 would not apply, would there have been any difficulty in the matter? Certainly not. Section 26 enacted, in the latter part of it, that the Barons may "from "time to time by any such rule or order extend, apply, "or adapt any of the provisions of the Common Law Pro- "cedure Act of 1852, and the Common Law Procedure Act "of 1854, and any of the rules of pleading and practice on "the Plea side of the said Court, to the Revenue side of the "said Court, as may seem to them expedient for making the "process, practice, and mode of pleading on the Revenue side of "the said Court *as nearly as may be* uniform with the process, "practice, and mode of pleading on the Plea side of such Court." The solution of the learned Judge does not solve the question at all. It is perfectly apparent, that if there was no other reason why section 26 should not have been used for dealing with the case of error, under that section 26 it would have been amply in the discretion of the Court to have said, in applying the provisions of the Common Law Procedure Act, We will not apply that provision which at first sight would make it incumbent upon the Attorney General to give bail.

Lord Chancellor.—How could they have done that? If they had power to transfer a provision, and the provision so to be transferred was incumbent with that direction, how could they transfer part of the provision minus the rest?

Sir Hugh Cairns.—The words are, as your Lordship will see, "to adapt any of the provisions of the Common Law Procedure "Acts," "as may seem to them expedient for making the pro- "cess, practice, and mode of pleading on the Revenue side of "the said Court as nearly as may be uniform with the process, "practice, and mode of pleading on the Plea side of such Court."

Lord Chancellor.—I do not think the word "adapt" would have enabled them to have excluded the wholesome clause accompanying that power.

Sir Hugh Cairns.—Then, my Lords, I will ask you to consider the other alternative. The learned Judge who advances this argument has forgotten that in the very rules under consideration the Court has done that,—that they have done the very thing which it is the whole foundation of his argument that they could not do, because they have transferred section 38 of the Common Law Procedure Act, 1854, and have made it their 12th rule. They have, therefore, done the very thing in it which either they could have done in a case of error, or, if they could not have done it in a Court of Error, they cannot do it now, because having gone a certain length with the words of the Common Law Procedure Act, clause 38, "Notice of appeal shall "be a stay of execution, provided that within eight days after "the decision complained of, or before execution delivered to the "Sheriff, bail to pay the sum recovered and costs, or to pay "costs when adjudged, be given in like manner and to the same "amount as bail in error is required to be given under the rules "of this Court made on the 22nd day of June 1860, or as near "thereto as may be applicable provided that such bail shall not "be necessary to stay execution in cases where the appellant is "the Crown, the Attorney General on behalf of the Crown, or "the Prince of Wales, or the Duke of Cornwall for the time "being."

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Lord Wensleydale.—Where is that?

Sir Hugh Cairns.—That is the 12th of those rules which are now under your Lordships' consideration, at page 192.

Lord Chancellor.—That embraces the 38th section of the Act of 1854?

Lord St. Leonards.—That is section 38, with an important difference.

Sir Hugh Cairns.—It modifies section 38 by introducing that proviso. Therefore I say that either that is right, and then, if it is, the same proceeding might have been taken with regard to error or——

Lord Chancellor.—Is this point affected by the rules that were made upon the 22nd of June 1860?

Sir Hugh Cairns.—No, my Lord, I think not. We have those rules here; but I think they merely relate, so far as I see, to the mode of putting in bail to the details as to justifying the bail; they do not affect the question of whether the Attorney General is or is not to give bail.

My Lords, it is sufficient, therefore, for my purpose, to take the argument of Mr. Justice Willes as it stands. I venture to say it could not be a solution of the difficulty even if it were accurate in all points. But it would be, I say it with great submission, a most lame and impotent conclusion to come to, to suppose that the whole of this extended machinery of the 18th and 19th

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sections, pointing to the time within which a writ of error can be brought, pointing to those circumstances as to disabilities that would excuse persons and give them a longer time for bringing the writ of error, pointing to the abolition of the writ of error and other matters pointed to in this section, was introduced to absolve the Crown from giving bail in cases of error. But I say, take the conclusion that Mr. Justice Willes comes to. The Court of Exchequer have shown in this case, with regard to these rules now under your Lordships' consideration, that they thought there was no such objection, and no such incompetency, for they have done the very same thing with regard to appeals.

I pass from that 19th section of the Queen's Remembrancer's Act, and I have to make an observation upon the 20th section of that Act. "Either party may tender a bill of exceptions on "the trial of any issues arising on the Revenue side of the Court, "and the like proceedings may be had and taken thereon as in "such cases between subject and subject." What is the argument upon that? Mr. Justice Willes again says, I am bound to account for that section being there, but the explanation I give is this: there was no such section in the Common Law Procedure Act, and therefore it was necessary expressly to refer to this matter, because there was some doubt whether a bill of exceptions would lie or not. Then I say, with great submission, if the argument of Mr. Justice Willes and of the Crown here is correct, if a bill of exceptions is part of the practice, process, and mode of pleading of the Court, then under section 26 there would have been surely power to the Court to have authorized in the case of Revenue cases that which was done in cases between subject and subject.

Lord Kingsdown.—What do you say is the explanation which Mr. Justice Willes gives of this?

Sir Hugh Cairns.—He says that there is no provision in the Common Law Procedure Act with regard to bills of exceptions. Therefore, he says, under the 26th section, the power to extend, apply, or adapt any of the provisions of the Common Law Procedure Act would not embrace this case.

Lord Chelmsford.—He says the bill of exceptions was given by the Statute of Westminster, and not by the Common Law Procedure Act.

Lord Wensleydale.—It only arises in a special case under the Common Law Proccdure Act, where you have a great number of plaintiffs together.

Sir Hugh Cairns.—Yes, my Lord. I found this argument upon that. I say, Adopt the construction of the words "process, "practice, and mode of pleading," which Lord Chief Justice Erle and Mr. Justice Willes have put upon those words. They say those words include everything from the beginning of a suit to the end, no matter how or where it occurs; no matter in what Court or place it occurs. I say, if that is so, how can you show

that a bill of exceptions will not be included in that, and that there will not be a right, under clause 26, to give as between Crown and subject that which did exist between subject and subject, whether it existed under the Statute of Westminster or in any other form.

Lord St. Leonards.—The other side have not made that point. They admit that the first part of section 26 could not authorize any such thing.

Sir Hugh Cairns.—I shall have to come to that in a moment, my Lord.

Lord Chancellor.—You are using the argument in this way: that the introduction of all those special provisions would lead one to the conclusion that the 26th section is not to have the character of a general rule?

Sir Hugh Cairns.—Yes, my Lord, quite so, and I am relieved of much argument on that point in this way, that the learned Judges who were in the minority in the Court below accede to that as a general proposition. They say that is quite true. At first sight, says Mr. Justice Willes, all these special provisions preceding the 26th section, I agree, would lead to the conclusion that you contend for. I mean to say that his argument implies that, or else it is idle altogether. My learned friend says it does not mean that. I say, what is the meaning of the elaborate consideration that Mr. Justice Willes goes into? He says, Take these early sections one by one. I will show what was the special reason and the special necessity for having these sections in the Act of Parliament. I say that that argument was one which we should not have heard from so eminent a person, if it did not proceed upon the basis which I mention. It begins by assuming that he is bound to show reasons for these special enactments, and therefore he is evidently open and alive to the objections raised by us, and he says *primâ facie* these special enactments would lead to the conclusion that everything to be given in the shape of appeal or further proceedings was to be given by these express enactments.

These observations, my Lords, have brought me up to the 26th section, and before I look at the words of it I desire to deal with a suggestion which is made upon the other side. We are asked this question on behalf of the Crown. It is said, Here is an Act of Parliament, which at all events seems calculated and designed to give to the subject very ample rights of reviewing proceedings which are founded in error; the motion for a new trial, and an appeal from the order upon that, is a very beneficial mode of reviewing proceedings in a court of appeal. What theory, say the Crown, can you suggest *à priori* why, in some way or other, it should not be intended by Parliament that the subject should have this very beneficial right? That is their argument, as I understand it.

Now I venture to offer your Lordships an answer which I venture to think is quite complete to that question. And I beg

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that you will not suppose that I am going to suggest that the Legislature passed this statute in the peculiar interest of the Crown, and that it was by some prerogative considerations led to think that it would be desirable that the Crown should not be vexed by appeals. I am not going to suggest any argument of that kind. I would ask your Lordships to consider it in a double point of view, both the point of view of the Crown, and the point of view of the subject. And whether it be considered in the one point of view or the other, I venture to think that very excellent reasons can be given why this particular right in that way of appeal was not conferred by the Legislature. First let me take it from the point of view of the Crown. Of course we all know what is the object of the Crown with reference to the collection of the revenue. It is not to oppress the subject; nothing of the kind; but, on the other hand, it is to have the revenue collected as expeditiously as, consistently with the interests of justice, it can be collected. Moreover, we know perfectly well that the object of the Crown in revenue cases is never to appeal for the mere sake of victory in a particular case. The object of the Crown is not to appeal unless some general question of principle ruling a great number of cases has to be established. Therefore looking at this Act of Parliament from the point of view at which we might suppose the officers engaged in the collection of the revenue would submit it to Parliament, what I should say is this: there was excellent reason for saying that the Crown would think that any question of principle upon the construction of the Act of Parliament, or any question of law relating to a question of revenue, can be properly and satisfactorily raised by way either of a bill of exceptions, or by way of a writ of error upon the record. In that way the decision of the ultimate Court of Appeal can be had, and everything that the Crown can desire can be obtained.

On the other hand, my Lords, I will look at it from the point of view of the subject; from which point of view also I suppose Parliament looked at the question. And I ask to whom are a multiplicity of appeals considered beneficial? Is it not always to the suitor who has the longest purse and the greatest resources? If you are asked, *à priori*, upon a litigation between A and B, to say, apart from the merits of the particular case, who will profit by having in that case three or six appeals, would not this answer most readily be given by any man: The chances are in favour of the person who can carry on the appeals with the greatest vigour and the greatest resources? Therefore you can see a reason why, viewing this case as it regards the interest of the subject, Parliament should say that the subject shall not be harassed by a multiplicity of these appeals; if any question is to be raised, let it be raised by a writ of error or by a bill of exceptions.

Then, my Lords, there is also this further important consideration. Your Lordships are well aware that the Court of

Exchequer is peculiarly the Revenue Court, and that the Judges of the Court of Exchequer are supposed, and rightly supposed, to be peculiarly conversant with matters connected with the collection of the revenue. There does seem to me to be every reason to suppose that if Parliament saw reason for saying that if a question, whether of law or of fact, were once brought away from Nisi Prius, from trial before a Judge there who was not perhaps a Revenue Judge at all, but may have been a Judge of one of the other Courts, to the decision on appeal of the Revenue Court in Banco, that is to say, the Court of Exchequer, and there decided by the Revenue Judges of the kingdom, that should be final, and that from that decision there should be no appeal. So that there would virtually be given by Parliament two courses. If you, the Crown, have, or if you, a subject, have, a point of law to raise, it can be raised, if you desire to have it settled by the Supreme Court of Appeal, by a bill of exceptions or by a writ of error. You will then have judgment in the Court of Exchequer Chamber and the House of Lords. Or there is another course open to you: you may go at once from the Judge at Nisi Prius to the Revenue Court in Banco. You may bring before them matters of fact or of law upon a motion for a new trial or of any analogous description. You will have the judgment of that Court, which is peculiarly a Revenue Court. After that there is no reason why the collection of the revenue should not be made if the judgment has been in favour of the Crown, or why there should be any further persecution of the subject by way of appeal if the judgment has gone against the Crown.

Lord Chancellor.—What actions are now begun upon the Revenue side of the Court of Exchequer as between subject and subject?

Sir Hugh Cairns.—None, my Lord, as between subject and subject.

Lord Chancellor.—I do not think you have fully explained that; you said you would take it first in the Crown's point of view, and secondly in the subject's point of view.

Sir Hugh Cairns.—I meant to say, if you suppose that the Legislature would look at the matter first from the point of view favourable to the Crown, and then from the point of view favourable to the subject,—I say, whether you look at it in the interest of the Crown or in the interest of the subject, there is every reason for believing that Parliament did wisely, if I may presume to use the expression, in saying that the bill of exceptions and the writ of error, or application to a Revenue Court in the shape of a motion for a new trial, should be the only modes in which the wrong should be set right, and that there should be no further appeal.

Lord Chancellor.—You made the observation, did you not, that the subject in a Revenue case is under a disadvantage as

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compared with the subject in an ordinary cause upon the Plea side of the Court?

Sir Hugh Cairns.—The observation which I made was this: I submit to your Lordships that there is an obvious reason, even looking at the case of the subject, why Parliament should not say that there should not be as against him this multiplicity of appeals, because it may be of singular advantage to the subject. The subject has a trial with the Crown at Nisi Prius,—it is brought before the Court in Banco, the Court in Banco decide in favour of the subject,—it is all important to the subject then that he should not be exposed to further litigation with the Crown, because, I say, the Crown having the longer purse, is able to carry on appeals, where the subject, in a similar case, might not appeal; so that instead of being a disadvantage it might be a great advantage to him.

Lord Chancellor.—The general policy of this section, and the obligation thrown upon the Court, is to make the practice upon the Plea side and upon the Revenue side as nearly as possible identical.

Sir Hugh Cairns.—Yes; that arises upon the construction, my Lord. I will come to that in a moment. I am now only dealing with the *à priori* question which is put to us on behalf of the Crown. How can you account, say the Crown, without looking to the words of the Act of Parliament at all, but taking the general purview of that Act, for its not giving every right of appeal in a Revenue case which exists in a civil case? That is the argument which I have been dealing with at present.

It will be convenient now, I think, after that introductory observation, to take the first part of the section, and deal with it by itself. Now the first part of the section is this: "It "shall be lawful for the Lord Chief Baron and two or more "Barons of the Court of Exchequer from time to time to make "all such rules and orders as to the process, practice, and mode "of pleading on the Revenue side of the Court, and as to the "allowance of costs, and for the effectual execution of this Act, "and the intention and objects thereof, as may seem to them "necessary and proper."

The first observation, my Lords, upon that is this: You will see who are to make the rules; it is not even the whole Court, it is the Chief Baron, and any two or more Barons; that is to say, a bare majority of the Court may make the rules. Then, my Lords, under this first part of the section they are to make these rules (whatever "these rules" may mean) and orders as to the process, practice, and modes of pleading from time to time. Then we have the words "as to the process, practice, and mode "of pleading." Your Lordships will see that those are the very same words which are used in the second part of the rule; and we have the admission of the learned Attorney General here, as I understand him, (though, of course, I do not desire to bind him

to it, if I draw an improper reference from his words,) that under the first part of this section there could not have been made by the Court of Exchequer the rules which are in question in this case; that is to say, that it could not be predicated of the rules which are in question in this case that they are rules as to the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer. For if that could be predicated of these rules, then of course the rules might have been made under the first part of the section. Then, of course I ask this question with great submission: if the conclusion of Chief Justice Erle is correct, who said that these words included the whole history of the cause from the beginning to the end, why could the rules not have been made under the first part of the section? It is utterly impossible, my Lord, as I submit, but that if these same words occur in the first part as in the second part of the section, the meaning in the first part must be just the same as the meaning in the second part.

Lord Chancellor.—All that the learned Attorney General admitted was, that under the first part of this section the Court of Exchequer could not compel this Court, or the Court of Exchequer Chamber, to open its doors to the reception of an appeal.

Mr. Attorney General.—That was my meaning, my Lord.

Sir Hugh Cairns.—Therefore, my Lord, it was an admission, as I was saying ———

Lord St. Leonards.—Perhaps it is the same thing; but I rather thought that your opinion was, Mr. Attorney, from what you stated after consideration, that the first part of section 26 would not have authorized the making of these rules and orders upon the appeals.

Mr. Attorney General.—Upon the ground which the Lord Chancellor has just so very clearly explained, that these rules include clauses and sections which relate to the Court of Appeal as well as to what takes place in the Court itself.

Sir Hugh Cairns.—I quite understood my learned friend. I will deal with his argument upon the second part of the section. He admits now, and we certainly can afford to state the question between us in clear words, something to this effect. I admit that these rules, with regard to appeal, cannot be termed rules relating to process, practice, and modes of pleading upon the Revenue side of the Court; but inasmuch as under the second part of the section, the Court are empowered to assimilate the process, practice, and mode of pleading of one side of the Court to that of the other, they may for that purpose drag in provisions ——

Lord St. Leonards.—And for that purpose to take in the provisions of the Common Law Procedure Act.

Sir Hugh Cairns.—Just so. If in doing so you have to drag in other provisions inseparably connected with them, even if

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those provisions go to the extent of an appeal in the House of Lords, you have the power to do so.

Mr. Attorney General.—Just so.

Sir Hugh Cairns.—I quite understand the argument, and upon that basis it shall be conducted. At all events it will utterly overthrow the judgment of the three learned Judges who were in the minority of the Court of Exchequer Chamber; because if there was anything clear in that Judgment it was that these rules were "process, practice, and mode of pleading in the "Court of Exchequer." My learned friend agrees that he cannot contend that those rules related to the process, practice, and mode of pleading in the Court of Exchequer.

Mr. Attorney General.—No.

Sir Hugh Cairns.—He must either, I say, make no admissions or let me show the consequences of those admissions, however little he may like them. My learned friend began by saying, I agree that these rules do not describe the process, practice, or mode of pleading of the Court of Exchequer, but in order to make the assimilation which the Act of Parliament desires, you draw in a number of other provisions, which do not relate to the process, practice, and mode of pleading of the Court of Exchequer at all.

Lord Chancellor.—Will you in due time attend to another mode of looking at it, which is this,—I think it is what one of the learned Judges meant,—the 35th section of the Act of 1854 makes a certain mode of appeal part of the practice upon the Plea side of the Court of Exchequer, that being made part of the practice upon that side by the statute, may under the 26th section be transferred to the Revenue side?

Sir Hugh Cairns.—Yes, my Lord, I quite understand it. I will deal with it presently. It will be found, I think, when I come to the second part of the section, that that will be as incapable of being contended for as any other part of the case. I will not fail to deal with it under the second part of the section. But, as I understand my learned friend, he will agree that under the first part of the section you could not by any proper interpretation or construction say that a new right of appeal given to the House of Lords, or given to the Exchequer Chamber, was that which could be given by the Judges of the Court under the term process, practice, and mode of pleading upon the Revenue side of the Court.

Then, my Lords, I will take the second part of the section, and before I ask your Lordships to take the accurate construction of the words, let me say that I think there are certain points upon the rules of this Court upon which there will be no controversy between us. In the first place, I say that such a provision as the power given to the Judges of the Court to regulate the proceedings of their Court, or to apply rules to their Court (and it cannot make the matter any better that it is to apply them to one side of the Court), so as to produce a certain effect upon the

process, practice, and mode of pleading of their Court, will not *primâ facie* confer the right of creating a new appeal. That is a kind of provision which your Lordships are perfectly familiar with. It is a provision to deal with matter arising in the four corners of the Court, and to make regulations upon matters of detail upon which no other body could make them so well as the Court itself. That would be so *primâ facie*, and I submit to your Lordships that, *primâ facie*, the words "process, practice, "and mode of pleading of the Court of Exchequer," whether you take the Plea side or the Revenue side, will not include the process or the practice of the Court of Appeal or of the Court of Error. *Primâ facie* that will be so.

Then I say further that, *primâ facie* the power to regulate the practice of the Court may, if there be already an existing right of appeal, and if there be certain steps in reference to that appeal to be taken inside the Court, confer a power to regulate those particular steps in the Court. But if there be not already an existing right of appeal, I say that *primâ facie* the power to regulate the practice of the Court will not give a right to the Court to create an appeal. I say those are propositions upon which I suppose there will be no controversy. Of course your Lordships will not understand me to say that those observations dispose of the case. I do not desire to beg the question at all. I will consider what is brought to bear against those propositions, but I say that *primâ facie* those will be the conclusions which will be drawn in such cases as I have supposed.

My Lords, there is, I apprehend, a further principle upon which there cannot be any controversy, and that is this: that a right of appeal is a right of a character such that it must be given in plain and distinct words.

Lord Wensleydale.—Have you any authority for that proposition in these terms? I see it is mentioned by some of the Judges in the Court of Queen's Bench that it must be in express terms; have you any authority to support that?

Sir Hugh Cairns.—All that I desire to say, and would hardly require any authority, would be this: You cannot give an appeal by inference. You must have words which clearly and by their legitimate construction give that right of appeal.

Lord Wensleydale.—No doubt you must have words which clearly give it.

Sir Hugh Cairns.—The first argument, taking them in order, as I understand them, which is brought to bear upon the case on the part of the Crown, is this: It is said that under the Common Law Procedure Act the words "practice, process, and "pleading" have received a particular construction, or have had a particular meaning fixed upon them, and that the effect of that meaning is to make them include everything which occurs in a Court of Error or in a Court of Appeal. That, my Lords, was the argument of Lord Chief Justice Erle and one of the arguments of Mr. Justice Williams.

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Now, I will ask your Lordships to consider that first. The first part of the Act of Parliament, the Act of 1852, which is referred to for the purpose, is the preamble of the Act of 1852. That states this: "Whereas the process, practice, and mode of plea- "ding in the Superior Courts of Common Law at Westminster, "may be rendered more simple and speedy." Now, my Lords, it is to be observed, in the first place, that this Act of 1852 did not confer any new right of appeal at all. The Act of 1852 did nothing more than regulate the existing proce dings in error. But, my Lords, I say further that the argument which has been attempted to be drawn from this preamble is plainly illogical. That argument is this: because the Act of Parliament says, "Whereas "the process, practice, and mode of pleading in the Superior "Courts of Common Law at Westminster may be rendered "more simple and speedy," and because afterwards in the course of the enactments certain provisions are inserted with reference to error and the Courts of Error, *ergo*, they say, everything that relates to error and Courts of Error is "process, "practice, and mode of pleading in the Superior Courts of "Common Law at Westminster." My Lords, of course it is an utterly fallacious argument, and a reversal of a proposition in a way that no sound rule of logic would sanction for a moment. I say again, is not it one of the modes in which the "process, practice, and mode of pleading" in one of the Courts, meaning inside of the Courts, can be rendered more speedy and a mode in which that can be done most efficaciously to take care that the Court of Error and your Lordships' House shall deal in the most convenient and most practical and efficacious way with errors which may be brought before the Court of Error, or before your Lordships? It does not, therefore, in any way, lead to the conclusion, which is the foundation of much of the argument of the learned Judges, that you can invert this preamble, and say that everything within the Act is put under the preamble, and that all the subjects of the enactments are to be considered as the "process, practice, and mode of pleading in the "Superior Courts of Common Law."

Then it is said with respect to subsequent parts of the Act (I think by Lord Chief Justice Erle) that throughout the Common Law Procedure Act the whole of the enactments from the beginning to the end are to be taken as "process, practice, and "mode of pleading" of the primary Court. I venture to deny that entirely. I have looked through the Common law Procedure Act, and I find that the words used in the preamble nowhere occur again.

There is no pretence for saying that the words are repeated, or that any further inference as to those words is to be drawn from the subsequent enactments. In fact I will ask your Lordships to look at one or two sections to show the contrary. The sections as to error begin at section 146; and, as one of your Lordships observed on Friday, they begin with something like a separate preamble of their own. At all events they begin thus:

" And with respect to proceedings in error, be it enacted as " follows." These sections I wish to refer your Lordships to, to show that the proceedings in error are not by any means taken as part of the proceedings of the primary Error Court, are sections 155, 156, and 157. Before going to those I will refer you to section 148, and I would ask your Lordships to look at that, because the words are somewhat remarkable. It says this: " A " writ of error shall not be necessary or used in any cause, and " the proceeding to error shall be a step in the cause.'" I observe upon that, because I see that one of the learned Judges, in repeating that section, read it as "proceeding *in* error." It is a marked distinction. The Act says "proceeding *to* error;" by which I understand the proceeding which is to take place in order to bring you to error.

Then, my Lords, in contradistinction to that, will your Lordships look at the 155th section? " Upon such suggestion of error " alleged and denied being entered, the cause may be set down " for argument in the Court of Error in the manner heretofore " used; and the judgment roll shall, without any writ or return, " be brought by the Master into the Court of Error in the Ex- " chequer Chamber, before the Justices, or Justices and Barons, " as the case may be, of the other two Superior Courts of " Common Law, on the day of its sitting, at such time as the " Judges shall appoint, either in term or in vacation; or if the " proceedings in error be before the High Court of Parliament, " then before the High Court of Parliament before or at the " time of its sitting; and the Court of Error shall and may " thereupon review the proceedings, and give judgment as they " shall be advised thereon; and such proceedings and judgment, " as altered or affirmed, shall be entered on the original records; " and such further proceedings as may be necessary thereon " shall be awarded by the Court in which the original judgment " was given."

Now, my Lords, I cannot understand words which could more clearly and distinctly point out the difference between the primary Court and the Court of Error. They are treated as separate Courts; the proceedings in the one are detailed from the beginning to the end, and in the Court of Error; and then you are carried back to the primary Court, and it proceeds with regard to the jurisdiction of the primary Court, and where it attaches, and the work of the primary Court, and how that is to be done. Then the proceeding to error is spoken of in the 148th section, where your Lordships will see how what is to be done in error is spoken of. The Court is treated as an entirely different Court. Then section 156 provides that Courts of Error shall have power to do certain things, to quash proceedings, and so on. Then section 157 says, " Courts of Error shall in all cases have power " to give such judgment and award such process as the Court " from which error is brought ought to have done, without " regard to the party alleging such error." So much, my Lords, therefore, for the Act of 1852. I say that the preamble does not

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warrant the inference drawn from it; and when we come to the proceedings in error mentioned in the sections of the Act, a clear distinction is drawn between the primary Court and the Court of Error, distinguishing the proceedings in the one from the proceedings in the other.

I might perhaps for a moment, because it can be more conveniently mentioned here than at any other time, advert to two citations of my learned friend the Attorney General, in the introductory part of his argument, where he cited to your Lordships a passage from Lord Coke. Lord Coke, speaking of the Court of Exchequer Chamber, for errors in the Court of Exchequer, for errors in the Court of Common Pleas, and for errors in the Court of King's Bench.

Lord Chancellor.—How came the writ of error to be applied to informations *in rem* in the Court of Exchequer, so as to carry them to the Court of Exchequer Chambers; do you know?

Sir Hugh Cairns.—I am not aware how it came about. That it was so, my Lord, I know, because I have observed very old precedents in your Lordship's house.

Mr. Attorney General.—I imagine that it is under the Statute of 21st Edward III. which I read to your Lordships.

Sir Hugh Cairns.—I was about to say, my Lord, with reference to the passage which was cited from Lord Coke, that one sees what Lord Coke meant, when he spoke of the Court of Exchequer Chamber "for errors in the Court of Exchequer." He meant for errors committed in the Court of Exchequer, "the "Court of Exchequer Chamber for errors in the King's Bench" meant for errors occurring in the Court of King's Bench, and so on. And in the early Statute of Charles II., as my learned friend pointed out, there occurred an expression of this kind, a writ of error depending in the King's Bench or in the Exchequer. One sees what that means. The writ of error went from your Lordships' house, or from the Exchequer Chamber, to the Judges of the original Court, desiring them to bring in that record. And until that was done, the writ of error was depending in the place to which it had been sent, and of course that was the way in which the Legislature expressed itself at that time. That is only by the way. I do not think these early Acts could have much bearing upon the present point. I now ask your Lordships to turn to the Common Law Procedure Act of 1854; it is in the printed Appeal Case. I will ask you to look at sections 36 and 41, and see whether there is anything in the Act itself which gives any colour to the statement that the expression, "practice, process, and mode of pleading in the Superior Courts," is used to cover proceedings either in the Court of Exchequer Chamber or in your Lordships' House. Section 36 is this—it is one which has already been referred to: "The Court of Error, "the Exchequer Chamber, and the House of Lords shall be "Courts of Appeal for the purposes of this Act;" separate Courts of course. The 41st section says, "The Court of Appeal shall

"give such judgment as ought to have been given in the Court "below; and all such further proceedings may be taken there- "upon as if the judgment had been given by the Court in which "the record originated." The proceedings, therefore, are distinguished in the most careful way, as to whether they are proceedings in the orginal Court or proceedings in the Court of Error.

That, my Lords, brings me (freeing the case, as I hope your Lordships will think it is, freed from any technical argument, to the effect that these Acts of Parliament have fixed a particular meaning upon the words "process, practice, and mode of pleading," and extended it to everything which occurred in the Court of Appeal and the Courts of Error,) to consider what is the precise meaning of these words. Some argument occurred upon this point the other day. I apprehend that upon all sound principles of construction it is utterly impossible, in dealing with words such as occur here, "process, practice, and mode of pleading," to take any one of those words, and to say that it by its meaning includes the other two. It is impossible to take the word "practice" as a word which would include process and pleading, or to take "process," or to take "pleading," and to say that either of those words includes the other two words. Those three words together make up a whole; they are perfectly separate from each other, and there is no difficulty whatever in distinguishing between the meaning of the one and the meaning of the other. What is the meaning of the word "process?" Your Lordships have only to refer to the Uniformity of Process Act. You will see that it means such writs as are indicated by authority of the 2d of William the Fourth, Chapter 39; it means the writs of judicial process which issue under the authority of the Court which is referred to in that Act. So likewise with regard to "pleadings." What is the pleading of a particular Court? I apprehend, my Lords, it is the pleadings entitled in that Court going to make up the Record. And then with regard to "practice," I apprehend it is that system of procedure by which the litigants of a particular Court are directed to regulate their actions, their acts, and their conduct of the cause in that Court. We have got in that way the judicial writs, the written pleadings, and what I may call the active practice, the whole going to make up a history of the occurrences in that Court.

My Lords, I will admit, and I will reason upon the effect of it afterwards, that if with reference to the proceedings of any particular Court there does exist, having been given *aliunde*, a right of appeal from that Court, and if some of the steps with regard to that appeal have to be taken in the Court, for example, such steps as justifying bail, or anything of that kind, those steps may and will become part of the practice of the Court in which those steps are to be taken. Now, my Lords, the difference between proceedings in the primary Court and the writ of error is, I think, very well pointed out in one of the books of practice, which will not be objected to, as it is a very fair authority upon this subject; I mean Mr. Tidd's Practice. I find that in the second volume of Tidd's Practice, page 1,161, 9th edition, after

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speaking of the giving of bail in error, he says, "all the proceed-
" ings which have been hitherto mentioned are in the Court
" below, where the judgment was given, but henceforth they
" are in the Court above, to which they are removed; and,
" accordingly, after the writ of error is brought and allowed,
" the names of the plaintiff and defendant in the original action
" are continued in the notices of bail, and the exception of rule
" for better bail, and the rule to certify, until a transcript of the
" record is carried over and filed in the King's Bench or Exche-
" quer Chamber. Then the names of the parties are reversed
" and they are called C.D. against A.B. in error."

Lord Chancellor.—Does that apply after the proceeding to error has been made a step in the cause?

Sir Hugh Cairns.—Yes, my Lord, I think it will. I will deal with that argument presently. I think it will apply.

Lord Wensleydale.—What is the date of that book?

Sir Hugh Cairns.—1828; before the Common Law Procedure Act passed. I will deal with your Lordship's observation in a moment. This is the distinction which, I apprehend will be found to be exactly the same in substance as that which would apply now. You have got something to be done in one Court. You have got then proceedings in the Court of Error. You then change the names of the parties as the names are changed, I believe, before your Lordships in this particular case; and the principle of practice laid down in the dictum of this book I apprehend entirely continues.

I have endeavoured now to show your Lordships how the case would stand, as I apprehend, upon the meaning of these words as they occur in the Common Law Procedure Act. But now I ask your Lordships' attention to a view upon this point taken by Mr. Justice Williams, and which I think will turn out to be very well worthy of consideration and investigation, although I cannot help thinking that if that learned Judge had been aware of the authorities which there were upon the view which he took, with the candour which is one and not the least of his many excellent judicial qualities he would have been induced very much to modify his opinion upon that point. I find this statement in the opinion of Mr. Justice Williams at page 181, between letters B. and C. After saying, "but it is argued that
" the language of the section confines the extension to such
" provisions of the Common Law Procedure Act as relate to
" proceedings in the Court of Exchequer itself, and does not
" allow of the application of such of those provisions as relate
" to appeals to the Exchequer Chamber and the House of Lords,
" which it is said are foreign to the Court of Exchequer, and
" are not part of its process, practice, and mode of pleading."
Then the learned Judge says, "But it should be observed that
" the proceedings in error, generally speaking, are not regulated
" by any rules of the Court of Error themselves, but by the
" *regulæ generales* of the Superior Courts at Westminster, out
" of which the proceedings in error come. And this appears
" to show that proceedings in Courts of Error by way of appeal

" may well be regarded as parts of the practice of those Courts " respectively."

Now, my Lords, of course that is a very striking observation, if it is well founded in fact, that the proceedings in Courts of Error are regulated by the *regulæ generales* made by the Judges of the Court of primary instance, and are part of the same code which regulates the practice of the primary Courts.

Now, my Lords, let us see how that is, because if I mistake not that opens a field of inquiry which will give us very ample information indeed as to the use of terms of the kind which occur here as to the practice of particular Courts. Under what authority,—under what parliamentary authority,—are the *regulæ generales* to which Mr. Justice Williams refers made? There are two statutory authorities, and I will contrast them with the statute which is relied upon in the present case as giving authority to regulate and to institute appeals. The two statutes are these: the first is the Act which passes by the name of one of your Lordships, the 3d and 4th of William the Fourth, chapter 42, and the statutes which have continued the power of making rules given by that statute. I will give your Lordships the titles of them; the 13th and 14th of the Queen, chapter 14, and, ultimately, the 18th and 19th of the Queen, chapter 26. The power to make rules was continued, I think, for quinquennial periods by these Acts.

Lord Chancellor.—Those are continuations of the power in Mr. Baron Parke's Act.

Sir Hugh Cairns.—Yes, that is, for making rules as to pleadings. I may state that these two last statutes are exactly in the same words; there is no difference between them; they are merely continuations of the former statute. The statute which gives power to make rules as to practice is the First of William the Fourth, Chapter 70, "An Act for the better Administration of Justice." Under these two parliamentary enactments two batches of general rules have been made, the one as to pleading the other as to practice. I will take the one as to pleading first: I will take Mr. Baron Parke's Act. What was the power given by that? In the first section it is enacted, "That the " Judges of the said Superior Courts, or any eight or more of " them, of whom the chiefs of each of the said Courts shall be " three, shall and may, by any rule or order to be from time to " time by them made, in term or vacation, or at any time within " five years after the passing of this Act, make such alterations " in the mode of pleading in the said Courts, and in the mode of " entering and transcribing pleadings, judgments, and other " proceedings in actions at law, and such regulations as to the " payment of costs, &c., as may seem expedient." Then those rules are to be laid before Parliament; and then it continues, that any rule or order so made "shall from and after such time as " aforesaid be binding and obligatory upon the said Courts and " upon all other Courts of Common Law *and upon all Courts of* " *Error into which the Judgments of the said Courts or any of*

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"*them shall be carried by any Writ of Error.*" There is an express provision that rules made as to pleading under this parliamentary enactment should not merely be rules binding the Courts whose Judges have made them, but that the rules should bind any Court of Error into which the proceedings should be carried by Writ of Error.

But even upon these words a doubt seems to have arisen, because I find that when this power was renewed in the 13th and 14th of the Queen, Chapter 16, the words were made stronger, and the words then occur in these terms, "that the "Judges of the said Superior Courts, or any eight or more of "them, of whom the chiefs of each of the said Courts shall be "three, shall and may, by any rule or order to be from time to "time by them made in term or vacation, at any time within "five years after the passing of this Act, make such alterations "in the mode of pleading in the said Courts, and in the mode "of entering and transcribing pleadings, judgments, and other "proceedings in actions at law." Then come these words which are new, "*and in the time and manner of objecting to "errors in pleadings.*" It seems to have been thought that the power to make alterations in pleadings might be confined properly to those pleadings which took place in the Court before the time of error, and might not extend to regulating the mode of assignments in error, or taking objections in error; and express power is given to the Courts of primary instance to make regulations of that kind. Then it goes on to say, that those rules shall "be binding and obligatory on the said Courts and "all other Courts, and on all Courts of Error into which the "judgments of the said Courts or any of them shall be carried "by any Writ of Error."

Now, my Lords, I ask is Mr. Justice Williams correct in concluding that the *regulæ generales*, so far as they deal with pleadings, so far as they profess to bind Courts of Error, are made under any inherent authority of the primary Courts, or are made because the proceedings in error are taken to be part of the proceedings of the primary Court? The statute has put the matter beyond all doubt, and in doing so has supplied a very strong argument, that, if it had not been for these express enactments in Mr. Baron Parke's Act, continued as they were in the following Acts, there would not have been the power in the original Court to bind the proceedings of Courts of Error.

Now how does it stand as to practice? As to practice the statute of which I have given your Lordships the title, the 1st of William 4th, chapter 70, provided first, in section 8, the constitution of the Exchequer Chamber, and the way in which Writs of Error were to be returned, that is to say, Writs of Error from one Court were to go before the Judges of the other two Courts in the Exchequer Chamber, and afterwards to go before the High Court of Parliament; and then, in clause 11 it says this, "that in all cases relating to the practice of the Court "of King's Bench, Common Pleas, or Exchequer, in matters over

" which the said Courts have a common jurisdiction, *or of or* " *relating to the practice of the Court of Error before mentioned,* " it shall be lawful for the Judges of the said Courts jointly, or " any eight or more of them, including the chiefs of each Court, " to make general rules and orders for regulating the proceedings " of all the said Courts," (that is to say, the superior Courts,) " and the said Court of Error." There is an express power given, and obviously because the power was required, to regulate, not merely the practice of the superior Courts, but the practice of the Court of Error before mentioned.

Lord Cranworth.—That was done by the Statute of William the Fourth, was not it?

Sir Hugh Cairns.—Yes, my Lord; the 1st of William the 4th, chapter 70, section 11. And accordingly we find, as I said before, that there are two batches of general rules made in Hilary term, 1853, after the first Common Law Procedure Act passed; that the general rules, as to practice, took notice of this power in those cases where the Courts possessed a common jurisdiction, excluding revenue cases, of course, to make rules as to practice. In the rules as to pleading they recited the power in the continuation of Mr. Baron Parke's Act to make rules as to pleading affecting the Court of Error. I therefore submit, my Lords, that the objection of Mr. Justice Williams, which I venture to think, as he put it, as his first reason, was one that weighed very much in his mind, entirely falls to the ground, and not only falls to the ground, but the circumstance to which he referred, namely, the manner in which the Court of Error is brought to be affected in any way by the rules of practice or pleading more properly shows that it was considered necessary to give a distinct and direct parliamentary authority before, by making rules of this kind, the Judges of primary Courts could in any way affect the Court of Error.

Now, my Lords, it is said, in the next place, and this is the next argument which I have to deal with, that the object of Parliament in enacting this 26th section, and the object especially of the second part of the section, was to leave to the discretion of the Judges of the Court of Exchequer a matter which could not properly be judged of without the exercise of their discretion, namely, the question whether this particular kind of appeal should be brought into operation in revenue cases. There a question occurs which I will humbly submit to your Lordships, and I will ask your Lordships to see how it has been met and answered by the learned Judges below. I venture to ask this question:—Is there any instance whatever in the history of legislation in which a Court has had it left to its own discretion to say whether there shall be a particular right of appeal from that Court or not? I agree that there are instances in the colonies and elsewhere of its being left to a Court of first instance to say, whether in a particular case, between particular litigants, having regard to all the facts which the Court sees to be material in that case, an appeal shall be permitted in that case. But I

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say, is there any instance in which it can be pointed out that the Legislature of this country has left it to a Court with which it was dealing to say whether an appeal *in omnibus* in all cases shall or shall not be given? And if it is said that this was a sort of appeal, as Lord Chief Justice Erle says, possibly liable to abuse by over litigious suitors, and that therefore discretion was to be exercised as to whether it should be permitted or not, I ask, with great submission, was not that a matter to be considered by Parliament, and to be considered once for all. Why was it to be considered afterwards by the Court of Exchequer? Why was it not for Parliament, and for those who were competent to direct the opinion of Parliament to consider whether the fact that an appeal of this kind would be liable to abuse should be a sufficient reason for refusing to grant it, or should not be a sufficient reason for so refusing, and that therefore the appeal should be given?

The only learned Judge who has dealt with this point is Mr. Justice Willes, and he says, that there are many analogies for the delegation of powers of this kind. Your Lordships will find what these analogies are; and I cannot help thinking that the weakness of the argument will be seen very much by looking at them. They are stated at the top of page 175 in Mr. Justice Willes' judgment. What are the analogies which he gives? Three, as I read them. First of all he refers to Mr. Baron Parke's Act; but that implied no such delegation of power. It is impossible to say that there was anything whatever in the powers given by that Act which could be at all analogous to the present case. The second is this, a right given to Her Majesty in Council to say whether this Common Law Procedure Act shall or shall not apply to certain inferior Courts in the kingdom. Is that any analogy? Her Majesty in Council is virtually the executive of the country in another form. Is not it perfectly and entirely consistent with what we are accustomed to, that the Legislature should have delegated to Her Majesty in Council the power to say whether such and such parliamentary enactments shall or shall not extend to a particular object? There you have not got the Court from which the appeal is to come exercising any judgment as to whether the appeal shall be allowed or not, but that is to be settled by an extraneous body altogether. When the learned Judge refers to the Acts of Parliament with respect to local government, the adoption of which is to rest with a particular number of the ratepayers in the district, I think he resorted to an analogy which if he had considered a little more carefully he would have seen was not worthy of his argument.

Now, my Lords, that brings me to the argument of my learned friend the Attorney General, which I said I should not fail to deal with, in which he says this:—You have pointed out, in the latter part of the 26th section, as the object to be attained, this:—The learned Judges are to extend, apply, or adapt any of the provisions o these Common Law Procedure Acts as may

seem to them expedient, "for making the process, practice, and "mode of pleading on the revenue side of the Court as nearly "as may be uniform with the process, practice, and mode of "pleading on the plea side of the Court." Then my learned friend says, you are, for this purpose, to take any of the provisions of the Common Law Procedure Acts. Then he says, upon the Plea side of the Court of Exchequer there is an appeal from a new trial motion; that appeal from a new trial motion is part either of the process, or of the practice, or of the mode of pleading of the Plea side of the Court of Exchequer. You are to assimilate the two; you are to take provisions which will enable you to assimilate the two. If in taking these provisions you draw in the whole of the provisions with regard to an appeal to the Exchequer Chamber or the House of Lords, you do not exceed your powers; you have got authority to do it. That I understand to be his argument.

My Lords, that argument depends of course at the outset upon this,—and if my learned friend does not prove this he proves nothing,—that the appeal from a new trial motion in cases between subject and subject is part of the process, practice, and mode of pleading of the Plea side of the Court of Exchequer.

Lord Chancellor.—Since the Act of 1854?

Sir Hugh Cairns.—Since the Act of 1854. If it is not part of the process, practice, and mode of pleading of the Plea side of the Court of Exchequer, then there can be no right, under a power which declares that it is expedient to make the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer as nearly as may be uniform with the process, practice, and mode of pleading upon the Plea side, to introduce a right of appeal such as is contended for here. Now, my Lords, I venture to think that we get back directly to the original argument. I deny that the right of appeal, as between subject and subject, is part of the process, practice, and mode of pleading of the Court of Exchequer. The whole argument depends upon that. The learned Judges who say that it is prove it in this way, and in this way only; they say that the Common Law Procedure Act must be taken to make everything with which it deals by reason of its preamble part of the process, practice, and mode of pleading in the Superior Courts of Common Law. I have dealt with that argument, and shown that it is an utterly unsound conclusion. Unless you show me in some Act of Parliament something which decrees that these words process, practice, and mode of pleading of a primary Court shall include a right of appeal from that primary Court, I take leave to deny that you have brought your case within the proper meaning of these words.

But, my Lords, let me go a little further. The argument of of the Crown is this:—I agree, says my learned friend in substance,—I do not know whether he says it in words or not,—that you could not say that an appeal and all the steps of it were part, accurately and strictly speaking, of the process, prac-

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tice and mode of pleading. But my learned friend says, there is something to be done with regard to the appeal; no matter how small, inside of the Court of Exchequer; there is to be a notice of appeal; there is to be bail given; in short, something, however small, is to be done with reference to the Court of Appeal. That, he says, is process, practice, and mode of pleading as between subject and subject upon the Plea side. Then you are to assimilate the practice of the other side to that. You cannot assimilate the practice of the other side *quoad* those particulars to the practice of the Plea side unless you draw in the whole right of appeal, and, *ergo*, you have the right to draw in the whole right of appeal. I deny that there is any necessary connexion between the two.

Lord Chancellor.—The 35th section goes further; it says, "provided the Court, in its discretion, thinks fit," and so on.

Sir Hugh Cairns.—Yes, my Lord, to give an appeal; but the Court can have nothing wherein to exercise its discretion until the right of appeal is given to it. The Court is perfectly incompetent to exercise any discretion whatever as to whether an appeal shall be granted in a particular case, unless Parliament has authorized an appeal to be given generally.

Lord Chancellor.—But if the Court is enabled to exercise a discretion with respect to giving it or not giving it, that is something to be done within the Court, and is a part of the practice of the Court; that is the argument.

Sir Hugh Cairns.—No doubt, my Lord; I agree with this. I take leave to make the admission freely. I admit that if you have got an appeal given *aliunde*, anything connected with that appeal which has to be done in the primary Court is part of the practice of the primary Court; but if you have not got an appeal given *aliunde*, then any proceedings with reference to creating an appeal which might occur in the primary Court are not part of the practice of the Court until you have created the right of appeal. It comes to be a complete instance of an argument in a circle. My learned friend says, I have got the right of appeal, because the preliminaries with respect to the appeal are part of the practice of the Court; and then he says, the preliminaries with respect to the appeal are part of the practice of the Court because the right of appeal exists.

Lord Kingsdown.—What is the additional power which you consider to be given in the second part of the clause?

Sir Hugh Cairns.—I will come to that, my Lord, presently. At present I take leave to say, that if you admit that the whole of the proceedings upon the appeal are not part of the practice of the Court,—and that is the admission which is made,—then I say that the preliminaries to the appeal which might be part of the practice of the Court if the appeal existed cannot be referred to and cannot be relied upon as part of the practice of the Court in order to create the appeal. These two things are perfectly distinct. The one is the preliminaries to the appeal, when once you have got the appeal created; and the other is the

right to create the appeal arising out of the circumstance that there are certain preliminaries which must be done as soon as the right of appeal is given.

Your Lordships will also observe, that in the second part of the section the words are not these, that they shall from time to time, by any such rule or order, be at liberty to extend, apply, or adapt any of the *other* provisions of the Common Law Procedure Act to the Revenue side of the Court of Exchequer; those are not the words. The Act of Parliament, as it were, assumes that, with regard to all those special appeals and special proceedings which are given under the earlier part of the statute, there could have been no power to extend the Common Law Procedure Act to the Revenue side of the Court of Exchequer. If the statute had thought that those earlier rights of appeal were rights of appeal which could have been given under section 26, the proper frame of the section would have been, by any such rule or order from time to time to extend, apply, or adapt any of the *other* provisions of the Common Law Procedure Act or any of the provisions of the Common Law Procedure Acts in addition to those herein-before mentioned. The words are not so, but they are simply "any of the provisions."

Then I ask your Lordships' attention to the words which it is contended give to the Court the power to grant this right of appeal. The words are these; they are authorized "from time "to time by any such rule or order to extend, apply, or adapt "any of the provisions of the Common Law Procedure Acts" to the Revenue side of the Court of Exchequer "as may *seem to them* "expedient for making the process, practice, and mode of plead- "ing on the Revenue side of the said Court as nearly as may be "uniform" with that on the Plea side; therefore they are the judges. I pray your Lordships' attention to this. If the construction put by the Crown on this section is the proper one, they are the judges of the extent to which there is to be uniformity. It is such an application or adaptation as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side. Now I do not know, if the construction of the Crown were right, what is to prevent the Court of Exchequer saying this:—We think that an appeal upon a new trial motion to a certain extent will be a very proper thing. We do not think it possible, having regard to the peculiarity of revenue cases, to extend the appeal *in toto* in all its constituent parts, and to assimilate to that extent the two sides of the Court of Exchequer. We do not think it right, at all events in the first instance, to go so far. We have authority to do it from time to time. We will begin by steps. We will give an appeal first to the Exchequer Chamber; that is our notion of what is expedient for making the process the same upon the one side of the Court as upon the other. We have a power to be exercised from time to time. Then if it turns out well we will

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extend it afterwards to the House of Lords. Some external body might say, We do not think that that is the proper thing to do. In our opinion the assimilation might be more complete. The Court of Exchequer might in that case answer, It is left to our discretion. We are the judges. You cannot say that we have erred if we have done that which seemed expedient to ourselves.

Now, my Lords, I ask your attention also to this argument. The power is not a power to extend, apply, or adapt any of the provisions of the Common Law Procedure Act to the *causes* on the Revenue side of the Court. And yet I could not fail being struck by the circumstance, that my learned friend the Attorney General more than once, in speaking of the effect of the clause, described it is a clause giving the power of extending, applying, or adapting the provisions of the Common Law Procedure Act to revenue causes. Those are not the words. I do not admit that even if they were the words the argument of the Crown would be entirely well founded. But your Lordships must see that a very different consequence might then be said to occur. It might be said then, a cause means the whole history of a cause from its first beginning to its last ending. You are authorized to extend, apply, or adapt the provisions of the Common Law Procedure Act to the cause. Therefore you mark indelibly the cause with all the qualifications and regulations of the Common Law Procedure Act. You say, this is a cause which has impressed upon it all the regulations of the Common Law Procedure Act, and those regulatious will follow it wherever it goes; whatever its history is, they will adhere to it. If it has gone through the Court of Exchequer it is still a cause which is to have all the provisions of the Common Law Procedure Act adhering to it, and wherever a cause under the Common Law Procedure Act can go it can go also. Those are not the words which occur here; but the words are carefully limited, and the extension of the rules is to be, not to the causes in the Court of Exchequer, but to the Revenue side of the Court of Exchequer. I take leave to say that the power of extending rules to one half of a Court cannot at all events be anything greater than the power of extending them to the Court. It is therefore, as it were, a power to extend the provisions of the Common Law Procedure Act to the Court, and to the process, practice, and mode of pleading in the Court, and not to the causes in the Court, wherever they may happen to go afterwards.

I think the fallacy of a great deal of that argument rests upon this consideration. The learned Judges who were in the minority in the Court below, and my learned friend the Attorney General, state the history of a cause as being the same thing with the practice of every Court through which the cause may pass. Now take the case of the Duchy of Lancaster Court, from which there is an appeal to the Court of Appeal in Chancery, and from the Court of Appeal in Chancery to your Lordships House. Of course the history of the cause there is the history of

everything that may happen to it in the Courts through which it passes; but the practice of the Duchy of Lancaster Court, and the practice of the Court of Appeal in Chancery, and the practice of your Lordships' House, are quite distinct, and the right to extend rules to one or the other or the third of those Courts would be a wholly different thing from extending rules to the cause itself.

Now, my Lords, I come to a question which one of your Lordships was good enough to ask me just now, namely, what is the difference which I should contend for between the power given by the first part of the section and the power given by the second? I think that is a question that I shall have no difficulty in answering, and I believe that the answer to it will make the argument still more plain. I think there are these differences between the various parts of the section; I say, in the first place, I take the second part of the section to have implied this, to have been a statutory, I will not say rule, but a very strong expression of statutory opinion; that so far as, properly speaking, and in the strict sense of the term, the practice, pleading, and process of the one side of the Court of Exchequer could be made uniform with that on the other it was to be done, supposing, of course that, the words practice, process, and mode of pleading mean what I say they mean.

Then I take the second part of this section to amount to a strong statutory expression of opinion, that so far as concerns these minor details, which properly are process, practice, and mode of pleading of the one side of the Court, they are to be made on the one side the same as on the other; that I say was the first purpose. Secondly, this obvious purpose is served by the second part of the section, that it enables the Court of Exchequer to do the very thing which by their former rules they have done; it is a power whereby a certain number of rules relating to the practice, process, and pleading, properly so called, in the sense in which I use those words, can be transferred at once to the other side of the Court of Exchequer. These words enable the Court to do that *in cumulo*. For instance, to say, we think that section 40 of the Common Law Procedure Act is a section which should be at once extended to the other side of the Court, and our rule is that it should be so extended.

Lord Chancellor.—Might they not have done that under the first five lines of the section?

Sir Hugh Cairns.—There might have been a question about it, my Lord. It is not necessary for my argument to say that they could not have done so. It might have been doubtful whether that was the sort of thing meant by the first part of the section which refers to making actual independent rules. Of course that will account for our having the second part of the section.

One of your Lordships put a question on Friday to my learned friend the Attorney General as to whether these rules could be varied from time to time. I think that that opens a very im-

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portant consideration. We know perfectly well that under an ordinary power to make rules for the practice of a Court it is the essence of that power that the rules may be made and unmade, and that they may be varied and altered from time to time. The very reason why such power is given to the Court of Exchequer is that cases may occur from time to time which necessarily will lead to the alteration of the rules. Now I venture upon this point to concur with my learned friend the Attorney General. He says, that as he reads the second part of the section when once any of the provisions of the Common Law Procedure Act which properly can be extended to that side of the Court are extended, they cannot be varied. I think so too. I think there is that very marked difference between the first and second parts of the section. I conceive that they both apply to precisely the same thing, namely, the process, practice, and mode of pleading.

Lord St. Leonards.—I did not understand the learned Attorney General to contend that under the first part of the section the Court might not vary the rules.

Sir Hugh Cairns.—I do not know that my learned friend the Attorney General expressed an opinion upon that point at all, nor do I ask him to give an opinion upon it. But I think your Lordship will be of opinion, upon a just construction of the section——

Lord St. Leonards.—You must come to some conclusion in order to get at the real meaning of the section upon this question. Under which parts of the section may you alter, or can you alter under either, the orders which you make? In ordinary cases I take it for granted, and I am sure it will not be disputed for a moment, that under a power from time to time to make rules and regulations the practice may be altered.

Sir Hugh Cairns.—I take leave to submit to your Lordship's much better judgment, that the rules, under the first part of the section, clearly could be altered from time to time. That is my view of the case. But I venture to think that under the second part they could not, for a very excellent reason, which I shall submit, founded upon the intention of Parliament. First, of course we must ascertain what is the meaning of the term practice, pleading, and progress. It means the same in the first as in the second part of the section. But there is this difference with regard to the effect of what is done; these rules, which I may call transitory and provisional rules, referred to in the first part of the section, which never had assumed the importance of being included in the Act of Parliament, may be made, and are made, from time to time. But, says Parliament, if you, the Court of Exchequer, think it right once to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts, for the same purpose, of the practice, process, and pleading, to the Court of Exchequer, then just as they are indelibly impressed upon the other side of the Court by Act of Parliament in like manner they shall remain without variation upon the Revenue side of the Court of Exchequer.

I apprehend, my Lords, that that is the most sensible view of it. The object of Parliament in so dealing with the matters with which Parliament deals is exactly the same in the one case as in the other. The process, practice, and mode of pleading are the same, but the effect is to be altogether different. If you, the Court, are making rules under the Common Law Procedure Act, make them and unmake them; settle your terms for pleading and those little minute particulars which are not worthy of an Act of Parliament; change and unchange them as you like from time to time. But here is the Act of Parliament which contains provisions properly dealing with practice, process, and mode of pleading. Take any of those provisions which do deal with practice, pleading, and process; but if you once take them let them remain upon your Revenue side of the Court, just as they remain upon the Plea side of the Court under the Act of Parliament.

Adjourned for a short time and resumed.

Sir Hugh Cairns.—My Lords, I was endeavouring to point out to your Lordships what appeared to me to be the effect of the second part of this 26th section, and the cases which would be found to be provided for by it, but which would not be provided for, or would be differently provided for, under the earlier part of the section. I have to mention one more difference between the two parts of the section. I cannot help thinking that there is a most distinct and peculiar and necessary reason for the second part of the section, in another point of view. The Common Law Procedure Acts, more especially the Common Law Procedure Act of 1854, introduced a number of matters entirely novel, which, when introduced, were in the strictest and most proper sense of the term practice of the Court. But there might have been, and I think there would have been, a very great doubt, if not a certainty, that under the earlier part of the section, under the power to regulate the process, practice, and mode of pleading of the Court, those novelties could not have been introduced, being, as they were, novelties both with regard to "process," with regard to practice, and with regard to the mode of pleading.

Now, my Lords, I will simply read to your Lordships what I refer to as being novelties which will be found in the various sections of the Act. The novelties, and entire novelties, which, I say, were introduced by the Act of 1854, as to process, practice, and mode of pleading, but properly ranging under the head of practice, when created, were these,—injunction, inspection of premises and chattels, attachment of debts, specific performance, specific delivery of chattels, and equitable defences. Your Lordships will see by the mere enumeration of these that they range themselves under the heads of process, and pleading, and practice. In process, pleading, and practice they were novelties, but when introduced they clearly formed part of the practice, process, and mode of pleading of the Court. There might have been a doubt, therefore, whether under the terms in the first

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part of the section there was a right to introduce into the process, practice, and mode of pleading those things so novel and so unusual. But I apprehend the second part of the section clearly would enable the learned Judges to adopt and introduce these things, and they then would properly become, in the strictest and most accurate sense of the term, the process, practice, and mode of pleading of the Court. These, my Lords, are the reasons which I humbly conceive account for the division of the section into two parts, as we find it.

Now, my Lords, before I leave the second part of the 26th section, I would simply ask you to take the literal and accurate construction of it. First, what is to be done? To extend, apply or adapt any of the provisions of the Common Law Procedure Act to the Revenue side of the Court. Now, I ask, can you by any possibility say that a provision which says that there shall be a new Court of Appeal, or two new Court of Appeal, giving also the right to come before those two new Courts of Appeal, is a provision which can be extended to the Revenue side of the primary Court? Is that a fit, apt, and proper use of terms? I say it is not. We have been arguing, I am sorry to say, for hours about it; but I believe that in an ordinary case which did not involve matters of importance beyond this objection nobody would argue it. It is an utter abuse of terms to say that the creation of a new Court of Appeal, and the right to bring cases before that new Court of Appeal, is a provision which is to be extended to the primary Court. It is impossible so to contend, according to the right use of words.

Then, my Lords, I say further, and I ask your Lordships' special attention to this, that the object is defined as being this, "to make the process, practice, and mode of pleading on the "Revenue side,"—not uniform with the process, practice, and mode of pleading on the Plea side,—that is not the object,—but, "as "nearly as may be uniform," which is quite a different thing. Why are those words introduced? For this, among other reasons, that even if there be a fragment of introductory or ancillary practice on the Plea side by way of anticipation of an appeal, the Legislature takes notice that you cannot actually make the two sides coincident. You are to make the practice upon the Revenue side "as nearly as may be uniform" with that upon the Plea side, having regard to this, amongst other things, that there is not this right of appeal on the Revenue side. That is exactly one of the points of difference between the two sides; one of the things as to which you cannot square the practices. You are not to make them uniform; you are not to say, because there is bail to be given inside of the Court with reference to a particular motion, as between subject and subject, therefore, upon the Revenue side of the Court, there must be bail; and if bail will be unmeaning and idle unless it is followed by the appeal, for which bail is to be given, therefore there must be the right to appeal also. That is not what the Legislature says. It says, no doubt, that you are to aim at uniformity, and that that is to be your object and desire; but it is to be so only so far as as you can,

legitimately and properly pursue that desire. And if the Legislature has not given any appeal, it would be idle to say that you are to introduce into the Court of Exchequer a practice ancillary to that appeal which is not given, therefore you are not to make the two sides of the Court uniform, but only uniform as nearly as may be.

My Lords, I have still an argument to meet, which was urged by the learned Attorney General both here and in the Court below, It was said, Read the section in a different way. Suppose this had not been left to the discretion of the Barons of the Court of Exchequer at all, but suppose Parliament had thought fit to say it is hereby enacted that there shall be extended to the revenue side of the Court of Exchequer such and as many of the provisions of the Common Law Procedure Acts as are necessary to make the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with the Plea side. Suppose that had been done, said Mr. Justice Willes, and says my learned friend the Attorney General, would there have been any doubt about the effect of it I think that a more fallacious argument was never advanced. In the first place, it gets rid altogether of the fact of previous legislation, and ignores the provisions already given by the Act of Parliament. It removes them from that branch of the argument altogether. It moreover ignores and gets rid of the argument, which I take leave to say is a very strong one, founded upon the circumstance that this is a power given to the Lord Chief Baron and two Barons of the Court of Exchequer—a bare majority of the Court, It ignores and gets rid of the argument of these matters being left to the discretion of the Court, and not being an enactment coming from Parliament itself. It ignores and gets rid of the inference founded upon the words "from time to time," not pointing to an assimilation once for all of the two sides, but to the introduction of bits and fragments from time to time. It ignores and gets rid, therefore, of four of those main and cardinal observations introduced by way of argument upon the construction of the section. And having done that, as it does, it lands you simply in the argument *idem per idem*. It raises, in a more favourable way for the Crown I agree, but still it does raise the same question, which has to be decided by your Lordships in the present case.

Then, my Lords, there is one more argument which I have to mention. It was said here, and said in the Court below by the learned Judges whose judgment is against us, that you must remember that there was a very different state of things to be considered in olden times in error, properly so called, when there was a Writ of Error, and that now the Writ of Error is abolished. Error is a step in the cause merely; an appeal, still more, is nothing but a step in the cause; and it was said, both by Mr. Justice Willes and Lord Chief Justice Erle, that now, it being different from what formerly was the case, a suitor brought into the Court of Exchequer Chamber, or brought before your

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Lordships, was so brought by virtue of the original process in the primary Court, whereas formerly he was brought by some separate and independent process.

My Lords, that is a complete misapprehension. I say, with great submission to the learned Judges who have used that argument, that there never was any process to bring a suitor or a litigant either before the Court of Exchequer Chamber or before your Lordships. The learned Judges have confounded two things which are perfectly distinct. They have spoken of a Writ of Error as if it were a process against a suitor, a litigant. It never was. A Writ of Error, my Lords, as your Lordships very well know, was a writ issuing out of Chancery, not directed to or served upon any of the litigant parties; it was directed to the chief of the Court where the error was alleged to have occurred. It was a Writ of Error directed to the Lord Chief Baron or to the Lord Chief Justice, directing and commanding him to bring the record before your Lordships. Those who are curious about the matter will find a field of interesting information upon this subject, in any work of history upon the subject. Mr. Macqueen's Practice of your Lordships' House is full of learning upon this point. It is a very remarkable thing. It appears that 200 years ago there are instances in your Lordships' House of what is called a *scire facias ad audiendum errores*. But there has not been an instance of that for more than 200 years. When it existed even it was not a process bringing in the litigant, but only warning him that he had better come and listen to the arguments on the other side, or he might lose his judgment. There was never a process by which a suitor could be compelled to come to the House of Lords or the Exchequer Chamber. And the way in which a suitor, when the Writ of Error prevailed, ascertained that anything was going forward, was that he found that he could not get his judgment. He found his record was carried off. He went to enter up judgment, and the record was gone. If it was not gone, the officer told him, "There is a writ commanding the chief of the Court to carry "out the record, and bail has been justified, and therefore you "cannot enter up judgment;" and if he chose not to come to your Lordships' House there was no power to compel him. He might lose his judgment, and that was all. And it is most remarkable that the process of your Lordships' House is now in a different position from what it was in then, because at that time, if your Lordships reversed the judgment, no process could issue from this House which could avail. Even then there was no process whatever. The record went back with an expression of your Lordships' opinion upon the Error, and that was all. Everything that had to be done then had to be done in the Court below. But now, under the Common Law Procedure Act (and this, in place of being a difference in favour of the argument on behalf of the Crown, is a difference the other way), there is authority given to the Court of Error and to your Lordships' House to do what never was done before,—to

issue an independent and separate process consequent upon or accompanying a reversal of the judgment.

Lord Chancellor.—Under what section is that?

Sir Hugh Cairns.—Section 43 of the Act of 1854, "upon an "award of a trial *de novo* by any one of the Superior Courts." *Sir H. Cairns*

Lord Chancellor.—That section only gives costs. There is another section which says that the Court of Error may enter the judgment, and thereupon it shall be carried to the Court below.

Sir Hugh Cairns.—Yes, my Lord. I will give you the section I refer to; it is section 42. "The Court of Appeal shall have "power to adjudge payment of costs, and to order restitution; "and they shall have the same powers as the Court of Error in "respect of awarding process or otherwise."

Now, my Lords, that carries us back to the Act of 1852. And there is this enactment with respect to the Court of Error in the Act of 1852, under section 157,—"Courts of Error shall in "all cases have power to give such judgment and award such "process as the Court from which error is brought ought to "have done, without regard to the party alleging error."

Lord Chancellor.—Now will you look at the bottom of section 155; the latter part of that section.

Sir Hugh Cairns.—No doubt, my Lord, there also was this power. "Such further proceedings as may be necessary thereon "shall be awarded by the Court in which the original judg-"ment was given." That is, if the Court thinks fit.

Lord Chancellor.—"And such proceedings and judgment, as "altered or affirmed, shall be entered on the original record."

Sir Hugh Cairns.—That is to say that the Court of Error may now do what it did before, if it likes; it may do just what and no more than it did before. The Court of Error may alter a judgment, and send it back; but it may also do what it never had the power of doing before. Under the 157th section "it may "give such judgment and award such process as the Court from "which error is brought ought to have done, without regard to "the party alleging error."

Lord Chancellor.—But that process is still the process belonging to the Court below. There is no process belonging to this House.

Sir Hugh Cairns.—Pardon me, my Lord; there is a special process for restitution in the section to which I referred. Section 42 of the Act of 1854 "The Court of Appeal shall have "power to adjudge payment of costs and to order restitution."

Lord Chancellor.—We order it, you know, by means of the Court below; we have no officers who have any power to issue a process.

Sir Hugh Cairns.—The words are too strong, I submit, to admit of a doubt: "The Court of Appeal shall have power to "adjudge payment of costs and to order restitution; and they "shall have the same powers as the Court of Error in respect "of awarding process or otherwise."

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Lord Chancellor.—That is restitution, as you are aware, of costs which have been paid in the Court below. We are constantly in the habit of ordering those costs to be paid.

Sir Hugh Cairns.—With great submission, my Lord, you order restitution in appeals from the Court of Chancery; but no judgment on a Writ of Error ever ordered restitution of costs until this Act of Parliament was passed.

Lord Chancellor.—We can order restitution of costs that have been paid under a judgment which is reversed.

Sir Hugh Cairns.—Never, I believe, my Lord, under a Writ of Error. You never exercised that authority in any instance. The 157th section of the Act of 1852 is this: "Courts of Error "shall in all cases have power to give such judgment and award "such process as the Court from which error is brought ought "to have done, without regard to the party alleging error." My Lords, it has been decided expressly by your Lordships that you could not award a writ of inquiry where the damages had not been assessed. These are decided points, that your Lordships could not do anything more than declare, before this Act passed, what the Court below ought to have done, and then it went back to the Court below to award process. There was something new, surely, meant to be enacted by this section; it was not merely a repetition of the old practice; it was a new practice. There was a new power created hereby. Then what I ask your Lordships to look at for a moment is this. I take the rule which has been made by the Court of Exchequer upon this occasion. I find here that the 8th rule says this:—"The Court of Appeal shall "have power to adjudge payment of costs and to order restitu- "tion; and they shall have the same powers as the Court "of Error in respect of awarding process and otherwise." My Lords, I ask that the case may be judged by that test. I ask my learned friends this:—Do they mean to say that that 8th rule which I have now read is—a rule applying to the Revenue side of the Court of Exchequer—one of the provisions of the Common Law Procedure Act? They cannot say so. Do they say that it is a rule applying to the purposes of the Act, or applying to the Court of Exchequer, one of the provisions of the Common Law Procedure Act? They cannot say so. Do they say that this power given to the Court of Exchequer is not a constituent and necessary part of the right of appeal under the statute? They cannot say so, for the right of appeal given by the statute would be inept unless it were for this power. Then, if this power is not anything which can form part of the practice or proceeding of the Revenue side of the Court of Exchequer, how can you take an appeal, of which this is a constituent part, and say that you apply that to the Revenue side of the Court of Exchequer?

Therefore, my Lords, I submit that, properly considered, the argument of the Crown, and of the learned Judges who were in the minority in the Court below, with reference to the question as to these Acts of Parliament having made a new kind of

process, not only falls to the ground, but turns into an argument against them. I say that there never was process before the Common Law Procedure Acts, whatever the case may be now, from the Exchequer Chamber or the Court of Appeal, compelling a litigant to appear before that Court. The conclusion, therefore, of Lord Chief Justice Erle, that now a litigant, by a proceeding different from what prevailed before, is brought before the Court of Appeal by a new process, is a mistake. Nothing brought the ligitant before the Court of Appeal formerly but the desire to maintain in argument the judgment which was appealed against.

Now, my Lords, upon this part of the case I have only one or two more observations to make upon some of the arguments of the learned Judges, and that I shall do more easily, and I think better, by asking your Lordships to do me the favour to look at the judgments to which I refer. The first in order is that of Mr. Justice Willes. I have been necessarily led to anticipate most of the arguments upon which that learned Judge relied. The first half of page 175 is occupied by the analogies which I have already referred to, by referring to which analogies Mr. Justice Willes endeavoured to show that this was a very natural power to delegate to the Judges of the Court of Exchequer. That is the first half of page 175. I have said already what I have to submit to your Lordships upon that. In the second half of page 175 he makes the hypothesis which I have also already made my observations upon,—the hypothesis, namely, that the statute, in place of delegating this power to the Court of Exchequer, might have said in so many words, Let there be extended from one side of the Court the provisions applicable to the other. I have nothing more to say in reference to that point.

Then, my Lords, at the top of page 176, the learned Judge refers to a test which I own seemed to me at first to be a singular one. He said, Take up any of the books of practice of these Courts. You will find, surely, that the proceedings in Courts of Appeal and the House of Lords, and so on, are mentioned in the book of practice. That is a very good test that ordinarily speaking the proceedings in the Courts of Appeal are included in the practice of the original Courts. Now, my Lords, I presume that a book of practice of the Court of Lancaster would very naturally tell us something about what was done in the Court of Appeal in Chancery and in the House of Lords. So also a book upon magistrates' jurisdiction would tell us something about *certiorari* and matters of that kind, which would control the decisions of the magistrate. Therefore, my Lords, I do not think it is a very fair test. But I had the curiosity to look at one of the best books on the practice of the Courts of Common Law, Chitty's Archbold's Practice of the Superior Courts, the last edition. I was curious to see how the question of practice in your Lordships' House would be dealt with. At page 580 of the 1st volume I find this: "After the judgment has been

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" affirmed or reversed in the Exchequer Chamber, error may be " brought upon the judgment of affirmance or reversal in the " House of Lords, &c. The following observations as to pro- " ceedings in error may be found useful, but we do not profess " to treat of the practice of the House of Lords as regards such " proceedings. The clerks at the offices of the House of Lords " should be applied to respecting the practice when any difficulty " arises ; and see Macqueen's Practice in the House of Lords." The book is halt and maimed, according to Mr. Justice Willes, and is an imperfect book. Yet I do not believe that there is any other book of practice which parties are in the habit of referring to upon matters of Common Law which would contain what this does not.

Then, my Lords, the next argument, on page 176, is the argument which I have already commented upon, namely, that now, different from what was formerly the case, a suitor is brought into the Court of Appeal by virtue of the original process in the primary Court. Upon that, my Lords, I have already submitted to you what I have to say. Then, at the lower part of page 176, the learned Judge deals with the conclusion, which I also have commented upon, drawn from the preamble of the first Common Law Procedure Act.

Then, at page 177, the learned Judge goes through those various sections from the 9th to the 26th, and he gives the reasons which he has to offer why these sections were specially put in. That also I have already answered. Then at page 178, I ask your Lordships' attention to this,—" But now comes the " question," says the learned Judge, " of an appeal upon a rule " for a new trial, which may be without the leave of the Court " when it is divided, and without the leave of the Attorney " General. Why should that discretion be vested in the Barons " of the Court of Exchequer, and why should it be for them to " say that appeal should lie in such a case ?" Now I own when I came to that question it struck me as being a very pertinent one, and I was very anxious to see what the answer was. What is the answer ? " I own I see no difficulty in answering that " question, because I conceive that the appeal upon a special case " after the argument of a new trial is only a more convenient mode " of raising a question which could have been raised upon a bill " of exceptions. Am I right in saying that you could raise " under a bill of exceptions the sort of question which is desired ? " So far as I can judge from the proceedings to be raised here, " I am of opinion that you can." Then the learned Judge goes off, and does not answer the question at all. That is no answer to the question. The learned Judge undertakes to answer the question, why the discretion should be reposed in the Barons of the Court of Exchequer, and he fails to do so. He proceeds to a wholly different matter, to show whether the proceeding upon a new trial motion is or is not the same as a proceeding by a bill of exceptions. If it is the same, then, again, I do not know why a discretion was left with the Barons of the Court of Exchequer

to say whether a rule should be made. If it is not the same, I am equally at a loss to conceive why it should be left to the discretion of the Barons of the Court of Exchequer.

I demur entirely to the fairness of the mode of dealing with the question, by judging this argument by the proceedings which have gone before in the present case, and the questions which are raised or which are not raised in the present case. That we know nothing about, as it were, upon this argument. It is not a question of what can be done upon this particular case; it is what can be done upon any case. I differ from the learned Judge as to the questions which were raised in this case; but it must be taken generally,—not with reference to this case, but with reference to any case that may arise.

Then, my Lords, the judgment of Mr. Justice Williams consists really of three reasons, as it were. The first reason is at the top of page 181, and that is a reason drawn from the power and the virtue which Mr. Justice Williams thought were reposed in the *regulæ generales* to regulate the Courts of Error. Upon that I have fully submitted to your Lordships our views. That reason begins at B. and goes down to C. Then the second argument of Mr. Justice Williams was this, which I have also anticipated. "That the Common Law Procedure Act had fixed "upon the words 'process,' 'practice,' and 'pleading' a "meaning which included every proceeding of the Court of "Appeal." That also I have dealt with.

Then, my Lords, the third and only remaining reason of Mr. Justice Williams is to be found, as I collect, between G. and H. After going through the earlier sections of the statute, his Lordship says, "The statute leaves it to the discretion of the "Barons, as being best able to judge of the expediency, to extend "to the Revenue side so many of the provisions of the Common "Law Procedure Act as they think right, in order to carry into "effect the declared purpose of uniformity." That, I apprehend, is exactly the point to be proved; it is not a reason at all; it is a *petitio principii;* and if that is so, of course, *cadet quæsteo*, that is the point we are arguing about.

Then, my Lords, I come to the judgment of Lord Chief Justice Erle.* It commences at page 182, at letter A., where his Lordship states the opinion he has arrived at, and proceeds to consider the statute. He says, "And first I would premise that "procedure in a suit includes the whole course of practice, from "the issuing of the first process by which the suitors are brought "before the Court to the execution of the last process on the "final judgment." Let me point out, with great respect, how dangerous it is to forget the condition of the argument for a moment. The question is not as to "procedure in a suit;" the question is, what is process, practice, and mode of pleading in a particular Court. The moment you wander from that you may use terms creating doubt and creating difficulty, "and throughout "the Common Law Procedure Acts and this Act 'procedure'

* Vide p. 76 of Report of "*Argument in the Exchequer Chamber*" (vol. 3.)

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" is used as equivalent to 'process, practice, and mode of plead-
" ing.'" My Lords, the word "procedure" does not occur in the Common Law Procedure Act, except in the short title which is given to it. "Procedure in civil suits in the superior Courts " of Common Law received memorable improvement by the " Common Law Procedure Acts, 1852 and 1854. Those Acts " are declared in the preamble of the first and the title of the " second to be for the amendment of process, practice, and mode " of pleading in the superior Courts." My Lords, in that I differ, with great submission; for that is not the preamble. The preamble says, that the practice, pleading, and process may be made more simple and speedy; but that is a different thing.

Lord Wensleydale.—He says the preamble of the first and the title of the second.

Sir Hugh Cairns.—Yes, my Lord; it is the title of the second; that may be so as to the title. "Those Acts provide " that each suit, from the issuing of the first to the execution of " the last process, shall be taken to be one entirety." My Lords, I own I have not found any such provision. "They contain " provisions for the practice to be followed in obtaining redress " for erroneous judgments by appeal to the Exchequer Chamber " and the House of Lords, the writ of error being abolished, and " proceedings in error being declared to be steps in the cause." Now, I speak with unfeigned respect, but I must say that in an argument of this kind anything so strongly inaccurate as this I could not well conceive. The words he uses are, "declare that " proceedings in error shall be steps in the cause." The Act of Parliament says, "Proceeding to error shall be a step in the " cause." Then his Lordship goes on. "Appeal is very essential " for maintaining the right administration of law, and careful pr " visions are made to give the use and prevent the abuse of the " right of appeal. According to these provisions, the appeal is " effected by the act of the suitor in the Court of first instance " delivering a memorandum to the officer of the Court without " writ or other authority, and the right to deliver that memo- " randum is vested in him in his capacity of suitor, derived " from the first process in the suit. That memorandum, so " delivered, if the rules of practice are complied with, compels " the officer of the Court below to bring the record into this " Court and into the House of Lords" [there is no record that comes in upon an appeal], " and may compel each of those " higher Courts to hear his appeal against the judgment " entered on the roll of the Court below, so brought by that " officer into the higher Courts, and he is to record thereon " the judgment of those higher Courts, and then to take back " that judgment to the Court below as the judgment in that " suit to be executed by that Court, according to the practice ' thereof. The provisions are ample for the practical guidance " of the suitor in carrying his appeal through each Court, and " they are clear to show that each Court of Appeal has no other " functions than to fix the time for hearing the case. Neither " Court can interfere with the record, or do any effective act,

" but hear and determine on the judgment to be pronounced. " The whole of these provisions in the Common Law Procedure " Acts are constantly described as relating to 'process, practice, " and mode of pleading,' and they extended to the Plea side of " the Court of Exchequer, but not to the Revenue side of that " Court." The constant description is not to be found in the Acts of Parliament. There is no mention of the words whatever, except in the preamble and in the title. " And this " brings me to the passing of the statute above mentioned, " the 22nd and 23rd of Victoria, chapter 21, under which " the Barons claimed to make this order." Now, I pray your Lordships to look at the assumption which follows. If you assume this, of course you may rapidly proceed to decide the case. " I assume that the procedure on the Revenue side " of the Exchequer was adapted to usages now obsolete, and so " was in need of being amended; also that the Legislature " intended to adopt this amended procedure of the Common " Law Procedure Act, as being consonant to the interests of " truth and justice, reserving no privileges to the Crown as a " suitor against a subject inconsistent with those interests." If that is assumed it must be assumed, I suppose, from the language of the Acts of Parliament. Then, if you assume that Parliament intended to give this appeal, of course you do your best to find out that Parliament has given it. " I would also " refer to the rule, that the rights of the Crown cannot be taken " away without clear words of enactment, as explaining the " insertion of some of the sections of this Act."

Then the learned Judge comes to the enactments; and now I will ask your Lordships to pass on. He enumerates them, and at letter C, on page 183, he continues, " I have referred to several " sections creating specific appeals. For all of these appeals, " both to the Exchequer Chamber and to the House of Lords, " the Barons must make order, under section 26, when making " orders as to process, practice, and mode of pleading on the " Revenue side; for if they did not do so the effectual execution " of the Act would be prevented." But, my Lords, the learned Judge omits to consider that their power to make rules as to those appeals was given specially by section 19, and that the natural and legitimate inference was, that if you have got a power as to these particular appeals to make rules given to you expressly, it was not intended that you should make rules as to appeals not specially given, much less that by those rules you should create other appeals which are not in any way referred to.

Then, my Lords, above letter G, on page 183, his Lordship continues, " The order in question applies section 35, which is " one of the provisions of the Common Law Procedure Act of " 1854, to the procedure on the Revenue side. The Barons are " directed to make that procedure uniform with the procedure on " the Plea side." My Lords, that is not so. They are directed to apply the provisions so as to make as nearly as may be the process, practice, and mode of pleading upon the one side the

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same as the process, practice, and mode of pleading upon the other. "Section 35 is part of the procedure which is in use on "the plea side." Now the right of appeal, I say, without going back upon my argument, is not part of the procedure. "And the "Barons, therefore, are not only empowered but required to "make an order for applying it, if they are to make the pro- "cedure on the two sides uniform, and if they think it expedient. "The order of the Barons seems to me, therefore, to be supported "by the words of section 26, and to accord with the intention to "be collected from the context."

Then, my Lords, his Lordship referred to two arguments which he thought were the arguments against that. I respectfully demur to the statement of one of them, which his Lordship said suggested that this appeal was on a new ground of appeal. That was not the argument, and his Lordship lower down himself corrects it, because at the last two lines on that page he says, "It "may well be that the Legislature thought that the Barons of "the Exchequer were best qualified to decide how far the collec- "tion of the revenue could be reconciled with the new rights "proposed to be granted" [that is what it is; it is a new right of appeal; it is not a new ground of appeal]; "rights which "might be subject to abuse by dishonest debtors sued by the "Crown." I do not think, my Lords, in the least degree that that judgment carries the matter any further.

These, my Lords, are the observations which I have to make in reference to the judgments of these learned Judges. Of course in arguing the case I have been led to state to your Lordships, though in much feebler words than those of the learned Judges who constituted the majority of the Court, the reasons upon which they founded their judgment.

But I have one other point to refer your Lordships to before I sit down. When I read the rules to your Lordships which had been made, I pointed your attention to the last provision at page 192 of the case before your Lordships. "The foregoing rules shall "come into operation and take effect forthwith, and apply to "every cause, matter, and proceeding now pending." Of course that must mean that they shall take effect immediately; and if the cause pending is in a state to which any one of the rules, according to its proper construction, can properly and fairly be applied, it shall be so applied.

I pointed out to your Lordships at the beginning the very singular mode in which these rules were ushered in, by the words declaring that the provisions of the Common Law Pro- cedure Act should be "extended, applied, and adapted to the "Revenue side of the Court of Exchequer; and also that the "following rules as to giving bail in cases of appeal shall be in "force on the Revenue side of the Court of Exchequer." I take leave to say that even if the Barons were supposed to have the power which they claimed, that was not the proper mode of exercising the power. But I now venture to submit that it is an entire misapplication to suppose that even if they had the

power which they claimed the rules they made upon the 4th of November 1863 would, under the circumstances of the particular case before your Lordships, have given the right of appeal now claimed under those rules. My Lords, that opens up a question of very considerable consequence, I venture to think, but one which is covered by decisions, I understand, so far as the decisions have taken place on the Common Law Procedure Act. One of your Lordships asked me how the Common Law Procedure Act dealt with suits pending at the time it was passed. The way in which it dealt with them was this: the Common Law Procedure Act, of course I mean the Act of 1854, received the Royal Assent on the 12th of August 1854, and in one of the later sections of it, section 104, it enacted, "the provisions of this "Act shall come into operation on the 24th of October 1854." The Royal Assent having been given on the 12th of August 1854, the Act came into operation on the 24th of October 1854. Of course it would not have received the Royal Assent until practically after most of the circuits were over, and it was to come into operation before Michaelmas Term.

Now, my Lords, I turn to sections 34 and 35 of the Common Law Procedure Act of 1854, which form the 1st and 2d rules of the Court of Exchequer made on the 4th of November. Let me read this section 34. "In all cases of rules to enter a verdict "or nonsuit upon a point reserved at the trial, if the rule to "show cause be refused or granted, and then discharged or "made absolute, the party decided against may appeal." Section 35 reads thus: "In all cases of motions for a new trial "upon the ground that the Judge has not ruled according to "law, if the rule to show cause be refused, or if granted be "then discharged, or made absolute, the party decided against "may appeal, provided any one of the Judges dissent from the "rule being refused, or when granted being discharged or made "absolute, as the case may be, or provided the Court in its "discretion thinks fit that an appeal should be allowed." There is a further proviso, that upon a matter of discretion there is to be no appeal.

You will observe that these two sections up to a certain point are substantially the same, dealing with different kinds of motions. Then in section 35 there are two provisoes added, qualifying the right of appeal given in section 35. Those two provisoes do not apply to section 34; that is to say, no leave of the Judge or of the Court is required there. Of course the second proviso would be inapplicable to a motion to enter a verdict or a nonsuit. From these two provisoes at the end of section 35 one gets at once the reason why all these kinds of motions were not included in one section, and only the enactment was divided into two portions.

Then the question occurs, when the Common Law Procedure Act comes into operation, how is it to take effect on suits then pending. Suppose there is a suit in which judgment has not been entered up, and which therefore is not technically at an

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end. But suppose a rule has been argued for and decided, the suit being still pending, judgment having not been entered up. Is there to be an appeal there? Suppose that the Judges have found that it occurred before the Act passed, or before it came into operation, I care not which, are the words to be taken in that sense or not? If you can predicate that any rule has been refused, or if granted has been discharged, and that there is a suit still pending, have you a right to appeal? Of course one would suppose that that would be a construction that would not be adopted readily, for that would be a retrospective operation of the worst possible kind.

But, my Lords, the matter has been the subject of discussion, and discussion in the first Court of Appeal, in the Exchequer Chamber, and I will state to your Lordships what has been decided.

Lord St. Leonards.—What case are you about to quote from?

Sir Hugh Cairns.—I will give it to your Lordship in a moment. This is the result of the decision there. Leave to enter a new suit, and the party may appeal. In fact it has been decided not to be retrospective, that is to say, it has been decided that the trial must take place after this enactment has come into operation, or else you cannot have your right to appeal. The arguments, as I understand, upon which the Court has arrived at that conclusion are twofold; one argument being this, that you are never to give a retrospective operation to an enactment of this kind, unless you are absolutely compelled to do it, and that words of this sort, to enter a verdict or a new suit upon a point reserved at the trial, ought to be treated as meaning upon a point reserved at a trial taking place after the Act came into operation. The other ground upon which the Court arrived at their conclusion was this. That with regard to rules to enter a verdict or nonsuit upon a point reserved at the trial, leave to enter a verdict or nonsuit cannot be reserved at the trial without consent, and therefore it is only fair towards persons who give a consent that you should take care to ascertain that they knew when they gave their consent all the consequences which their consent might lead to. I do not know whether I express myself so as to make myself understood by your Lordships.

It is quite true that in section 35 the ingredient of consent may not necessarily enter of course. But still the words are quite the same and if the considerations to which I have referred have fixed the construction of those words in section 34, the words cannot mean in section 34 one thing and in section 35 another. If the words in section 34 are to be read thus :—"In "all cases of rules to enter a verdict or nonsuit upon a point "reserved at a trial taking place after this Act shall have come "into operation," then section 35 must read in this way :—"In "all cases of motions for a new trial upon the ground that the "Judge has not, after this Act shall come into operation, ruled "according to law, if the rule to show cause be refused," then certain consequences shall take place.

Lord Wensleydale.—Can you reserve a question for the consideration of the Court without the implied consent of the parties?

Sir Hugh Cairns.—Certainly not, my Lord; that is the ground of this. Therefore upon the two sections there may be one construction, or another construction for both; but there cannot be one construction for one section and another construction for the other section. The two sections, I apprehend, must be construed on exactly the same footing. It would be stultifying all the rules of construction of Acts of Parliament to say that section 34 might be read as applying before the trial had taken place, and section 35 after the trial had taken place. The words are to all intents and purposes, for this point of construction, the same. If there is good reason for holding that section 34 is not to be brought to bear if the trial has taken place after the Act has come into operation, so must it be with section 35.

Lord St. Leonards.—What is the case which you have been referring to?

Sir Hugh Cairns.—The case is one greatly considered in the Exchequer Chamber. It is the case of Vansittart v. Taylor, reported in the 4th volume of Ellis and Blackburn, page 910. It was error from the Court of Queen's Bench; it was an error from one of these rules. A rule was obtained to set aside the proceedings, upon the ground that the case was not within the Common Law Procedure Act of 1854. The facts are these: "The action was tried at the last Kent summer assizes," that is to say, at the summer assizes 1854, "before the Lord "Chief Baron, on the 7th July 1854, when a verdict passed for "the plaintiff, with leave to move to enter a verdict for the "defendant. In the ensuing Michaelmas Term (November 3d) "Mr. Montague Chambers obtained a rule nisi, pursuant to "leave reserved, which in the same term (November 16th) was "discharged."

Lord Chancellor.—Is it necessary to read the case? I decided that the 34th section was prospective.

Sir Hugh Cairns.—Yes, my Lord. The argument took place upon the 34th section; but the views of the Judges are these:—Chief Justice Jervis says: "In my mind there is no doubt that "this rule ought to be made absolute. There is no difference of "opinion on the second point. We are all agreed that jurisdic-"tion cannot be given by the conduct of the parties, if we have "none independent of it; so that the only question is, whether it "is given in this case by section 34. It seems to me that the "meaning of that section, if read in conjunction with section 35, "by lawyers cognizant of the general rules of law, is very clear. "If a rule for a new trial be refused, or granted and discharged, "or made absolute, the party may appeal, if the Court, in its "discretion, think fit to allow it, or if one of the Judges dissent. "But if the point be reserved at the trial, which must be by "assent of the parties, then a Judge has, with the assent of the "parties, declared it a fit case for an appeal, and there may be an

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" appeal without any further leave. Now, at the time when the " point in the present case was reserved, there was no power " to appeal; the point was reserved for the Queen's Bench, and " the Queen's Bench only. But, according to the argument " against this rule, the effect of the subsequent Act is to make " this reservation before the Act equivalent to an assent by the " parties that the point should be reserved for the Queen's Bench " and the Courts of Error. There was, in fact, no such assent; " and, therefore, I think the Act must be construed as apply- " ing to points reserved after the Act."

Lord Chancellor.—Otherwise it would have been a surprise upon the parties who consented to the point being reserved.

Sir Hugh Cairns.—Yes, my Lord. Very possibly that may be the true key to the interpretation of the 34th section. But if once you have got the key to the interpretation of the 34th section, the 35th section must stand or fall along with it.

The Lord Chief Baron says: "I am of the same opinion. The " language of section 34 is no doubt couched in terms apparently " absolute; and this is the case of a rule to enter a verdict upon " a point reserved at the trial. But it appears to me a very " imperfect view of the rules of construction to say that, because " an exception is not in express terms engrafted in the enact- " ment, therefore the enactment cannot be construed as containing " it, if there appear sufficient reason for such a construction. " Special cases can be stated only by consent; and points cannot " be reserved at the trial without assent, either expressly given " or tacitly. In either case assent is an essential ingredient; and " it is proposed to construe the statute as enacting that, when " the parties assented to go to one tribunal, they are bound by " virtue of that assent to go to another. But, generally speaking, " the language of an Act of Parliament, however much it may be " couched in the present tense, is to be construed as applying to " the future only. It seems to me that the framers of this Act " meant to make no difference between the assent to special " cases and to points reserved. When parties assent after the " Act they assent to an appeal to a Court of Error, but they did " not do so when they assented before it."

Then Mr. Baron Parke says: "I take it to be a clear rule of " law that the language of a statute is *primâ facie* to be con- " strued as prospective only. This is according to the legal " maxim, *Nova constitutio futuris formam imponere debet non* " *præteritis*. Mr. Chambers admits that this rule of construction " shows that section 34 applies to rules to enter a verdict upon " a point reserved only when the rule shall be granted in future; " but I think it shows also that it applies only when the point " shall be reserved in future. It could never be the intention of " the Legislature to alter the effect of agreements to which the " parties had come before the passing of the Act. Now what is " 'a point reserved at the trial?' To reserve it requires the " assent of a Judge and of both parties. The Judge cannot " reserve the point without the assent of both parties. That was

" laid down in the Exchequer in a case decided last term. " Neither can the Judge divest himself of his duty. He always " may refuse to assent to reserve a point, though the parties " agree to it; and he often ought to refuse his assent, as if the " point be one of a frivolous nature. Therefore the reservation " of a point at the trial requires the agreement of three parties."

Lord Chancellor.—The point which we are now upon is, whether the Barons of the Exchequer were warranted in applying these rules to pending proceedings.

Sir Hugh Cairns.—No, my Lord. I will state to your Lordships what it is in a moment. It would not be quite so; it would have an aspect somewhat the same; but the point of my argument is this, that, assuming that the Barons of the Exchequer now had the power to make these rules, and that they had said at the end of them, as they have in fact said, These shall apply to all pending proceedings, that is saying nothing more than was said in the other case under the Common Law Procedure Act, and in that case it was decided that if you have a trial taking place before the rule or the enactment came into operation the enactment or the rule could not be applied to that case. His Lordship concludes thus: "I should have thought that after the " decision in Hughes v. Lumley there could have been no doubt " upon the subject." Then Mr. Justice Cresswell concurs, as do also Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crowder, and the only dissentient was Mr. Baron Bramwell, who took a different view of the case.

One of the other two cases upon this point which both preceded that one is reported in the same volume. Both of them are cases which led up to that decision. Hughes v. Lumley is reported in the same volume, 4th Ellis and Blackburn, page 358. There no doubt was error there on the special case, and that case, I agree, also took notice of the agreement that was necessary for the settlement of a special case. Then, my Lords, there is another authority, Jenkins v. Betham, in the 15th volume of the Common Bench Reports, page 190. That, my Lords, merely contains the view of the Lord Chief Justice Jervis upon the point. He says, "The 35th section is not retrospective; its " language shows that it could only have been intended to apply " to cases where the trial has taken place since the passing of " the Act."

Lord Kingsdown.—That is upon the 35th section.

Sir Hugh Cairns.—Yes, my Lord; that is the very section in question.

Lord Cranworth.—Was it a decision upon that question, or only an *obiter dictum*?

Sir Hugh Cairns.—The question was ultimately decided upon another point. They granted a new trial upon the ground that the verdict was against evidence, therefore it was not ultimately necessary to consider that question. That was a dictum of the Lord Chief Justice. But the case upon the 34th section, so far as the authority of the Exchequer Chamber and of the persons

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constituting it goes, is quite precise. The way in which the Court arrived at their decision was this, that for a motion such as is pointed at in section 34 you must have the consent of the parties, if leave is reserved. That fixes the construction of section 34, and in fixing the construction of section 34 it fixes the construction of section 35 also. I submit it is impossible to have a different construction of the two sections. Therefore I am entitled to read the same words into the 35th section, that upon the motion "for a new trial upon the ground that the "Judge has not ruled according to law, if the rule to show cause "be refused," and so on. I say that the same consideration arises with regard to section 35, as with regard to section 34, beeause it is absolutely necessary that parties should know at *nisi prius* while the trial is going on the results on the one hand of tendering a bill of exceptions or on the other hand of omitting to tender a bill of exceptions, and having a point reserved, and proceeding by way of a motion for a new trial.

Lord Chancellor.—Did you take this point in the Court below?

Sir Hugh Cairns.—No, my Lord; we took the ground that the rules were *ultra vires*, and left it there; we did not go into this question. But it is open to me to take it now, I apprehend. It is a question of jurisdiction; not of argument on the law.

Lord Chancellor.—I wanted to know whether it had been taken.

Sir Hugh Cairns.—No. Your Lordship knows the way in which the question arose before. I opened the preliminary objection simply.

Lord Chancellor.—The point is this; you contend that the second rule ought to be construed upon the same principle and in the same manner in which the 34th and 35th sections of the Act of 1854 have been construed.

Sir Hugh Cairns.—Yes, my Lord. The first and second rules are the 34th and 35th sections. It begins by saying, "that the "following provisions of the Common Law Procedure Act be "extended," and so on, to the revenue side Court of Exchequer. Then the statement at the end of the rules is, that they shall "come into operation and take effect forthwith, and apply to "every cause, matter, and proceeding now pending." That cannot alter the construction in the least degree of the earlier sections.

Lord Chancellor.—The question is whether that be *ultra vires*.

Sir Hugh Cairns.—No, my Lord, with submission.

Lord Chancellor.—The Barons of the Court of Exchequer have not left it *in dubio* whether they meant it to apply to pending proceedings.

Sir Hugh Cairns.—Pardon me; with great submission they have. What they have done is this; they have applied the whole of these rules *in cumulo* to all proceedings then pending.

Lord Chancellor.—So I say; they have not left it in doubt.

Sir Hugh Cairns.—They have not said at what stage of the pending proceedings the rules are to be applied.

Lord St. Leonards.—They have said expressly, "the foregoing "rules shall come into operation and take effect forthwith," (that means) instantly, "and apply to every cause, matter, or proceed- "ing now pending." There is no question whether they have done it; the only question is whether it was *ultra vires*.

Lord Cranworth.—I understand you to say that that might mean that it is to apply to all matters now pending, but not so as to affect a person after a trial, if the trial has taken place before the rules were made.

Sir Hugh Cairns.—Quite so.

Lord St. Leonards.—The question appears to be, whether they had the power to make that rule?

Sir Hugh Cairns.—I should contend for that also; but it is not necessary to contend for so much as that. Let me read what I say is the proper construction of these rules. You will see how it agrees with the words.

Lord St. Leonards.—You say first of all that if they have the power the law will ascribe the words to future cases, and, secondly, that they have not the power.

Sir Hugh Cairns.—Yes, my Lord. I desire to put it beyond all doubt.

Lord St. Leonards.—The words point to immediate operation in every case.

Sir Hugh Cairns.—Let me read to your Lordship the words? "In all cases of rules to enter a verdict on nonsuit upon a point "reserved at a trial." After these rules come into operation, then so and so shall be done. Now under these words, "the "foregoing rules shall come into operation and take effect forth- "with, and apply to every cause, matter, and proceeding now "pending," if you have a cause pending which has not gone to trial the rule will take effect at once, but if you have a cause which has passed through trial, and in which the judgment has not been entered up, you are not to apply that rule, because the principle of construction does not lead to its application in any way.

Lord St. Leonards.—What was the exact state of this cause at the time when these rules were issued?

Sir Hugh Cairns.—The state of the cause was this; it had passed through trial; the trial was past and gone; a verdict had been obtained against the Crown, and at the time of the trial there was no right to anticipate that there would be any power to insist upon any of these rights of appeal. Therefore, if the words at the end are to control the construction of what goes before, unless you go to the extent of saying that, if you can get hold of a cause on the Plea side of the Court of Exchequer in which judgment has not been formally entered up, no matter what has been done in it, and in fact unless you go further than that, and say, if the trial is past and gone, and also a rule obtained and discharged, even in that case if this general order has not

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been made until after the rule for the new trial had been argued, and after it was discharged, and after it was known who had succeeded, unless you say that in that case these rules would have given the right of appeal, I say you must revert to the construction put upon the Common Law Procedure Act in the cases to which I have referred.

Lord St. Leonards.—I was going to observe that these rules were made just to apply at the moment when you were entering upon a further step.

Sir Hugh Cairns.—They applied just at the time that the application for a new trial was made.

Lord St. Leonards.—Therefore in point of fact they intervened at the very instant, and before that there was no such power of appeal existing.

Sir Hugh Cairns.—They did.

Lord Chelmsford.—If there had been a bill of exceptions before the motion for a new trial that bill of exceptions must have been abandoned.

Sir Hugh Cairns.—Yes, my Lord.

Lord Chelmsford.—Was that bill abandoned?

Mr. Attorney General.—Yes, my Lord; we were required to do it.

Lord Chelmsford.—Before the motion for a new trial it was necessary that you should abandon it.

Lord St. Leonards.—The bill of exceptions had failed in its operation, and then it was necessary to create these rules if there was to be a right of appeal.

Mr. Attorney General.—I do not know what is meant by saying that the bill of exceptions failed.

Lord Cranworth.—We cannot look at there having been any bill of exceptions.

Sir Hugh Cairns.—No, my Lord. You will justify me that I have not gone into that. I am sure my learned friend the Attorney General will not go into it in reply, because it is a point which I have felt myself barred from. I was about to say that the Common Law Procedure Act virtually said just the same as these rules say. The Common Law Procedure Act, in saying that it should come into operation upon a particular day meant that it should apply upon that day to all proceedings then pending.

Lord Chancellor.—Your argument is this, if you put the construction which you contend for upon the second rule, then the word "pending" does not in the smallest degree interfere with it.

Sir Hugh Cairns.—Not at all. It does not point out how the rules are to be applied when a cause has got to that stage which makes this or that rule inapplicable to the different circumstances. Therefore I say, if you assume that there was an authority to make the rules, still they do not apply so as to give the appeal in this case; and I say, further, the last clause has

the meaning of applying to all that goes before that would make the rules incompetent.

I have now laid the case before your Lordships. I regret the length to which this matter has gone. I now leave the matter in your Lordships' hands. There is one observation only which I desire to make. It fell from the Lord Chief Justice in the Court below, that it was to be regretted that in a case where a point of public interest might have been decided the matter should have been disposed of upon a preliminary objection of this kind. In a public point of view I bow entirely to a consideration of that kind. But appearing here for a suitor I cannot recognize, and I feel sure that your Lordships will not recognize for a moment, any consideration arising from that. We have fought the matter in dispute, at an expense which is rapidly mounting up. Our only desire is to recover our property.

Lord Chancellor.—You may be quite sure that this house will give the same judgment as if it were a matter of 20*l.*

Sir Hugh Cairns.—I have no doubt your Lordships will do so. All I have to say is, that that is the judgment I claim upon behalf of the clients whom I represent; and with those observations I leave the matter in your Lordships' hands.

Mr. Mellish.—My Lords, perhaps it may be convenient to your Lordships if I, in the first place, say a few words upon the point which my learned friend Sir Hugh Cairns has just concluded with, now that the question is before your Lordships' minds. The question upon that point is this:—Can it be supposed that the Legislature have given power to the Barons of the Court of Exchequer to make a rule by which a party who has obtained a verdict at a trial shall have that verdict set aside in a way in which it could not have been set aside at the time when the trial was had? Such a power would manifestly operate unjustly, because it does not operate evenly between the parties. At the time when this trial was had a verdict obtained by a defendant, no matter what may have been the error in the ruling of the Judge at the trial, could only be set aside either by a bill of exceptions or by the judgment of the Court of Exchequer, in which the Judge who presided at the trial would be one of the Court. The effect of this rule, if it has the operation which the Crown contends for, is, that such a verdict may be set aside, in addition to these methods, either by the judgment of the Court of Exchequer Chamber, or by the judgment of the House of Lords.

Now is it not contrary to the general rule, that statutes are never to have a retrospective operation where the right of a party will be affected, and where a party will be deprived of a right which he has already obtained, if you give to it a construction by which a verdict which has already been obtained in favour of one of two parties can be set aside? If the rule was made possibly after the proceedings were taken, but before the trial was had, it would operate perfectly evenly to the two parties, and it would have the same operation as if it had been

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made before the first proceedings were taken, or even before any offence was committed at all. It might operate either in favour of one side or the other; it might be as beneficial to the defendant if he lost the verdict to have an additional mode of excepting to the correctness of that verdict as it might be to the Crown. But if the rule is not made till after the verdict is obtained, it no longer operates equally, and it exposes the party who has obtained the verdict to an additional mode by which the verdict may be set aside; and, moreover, it manifestly causes him this additional risk, that instead of being subject to the opinion only of the Court in which the Judge whose error is to be corrected will be one of the Court, he is compelled to run the risk of the decisions of some other tribunals.

Now your Lordships know that verdicts have always been to a great extent sacred matters in our law. A verdict in a criminal case cannot be set aside at all to this day, no matter what is the error that any Judge may have committed, unless indeed the Judge may have reserved a question for the Court of Criminal Appeal, and even then it must be a verdict against the defendant. A verdict in a criminal case in favour of a defendant cannot be set aside at all. It is said that it is better that any number of errors should be committed than that a party should be put in peril twice. This is a quasi criminal proceeding; it is a proceeding under the Foreign Enlistment Act, necessarily involving a misdemeanor. It is an entirely penal proceeding for the forfeiture of a vessel; and yet it is said that where a subject in a fair trial between the subject and the Crown has obtained a verdict a rule may be obtained by which that verdict may be set aside in some way in which it could not be set aside at the time that the trial was had. I submit that that is contrary to the rule which has always prevailed, that statutes are not to have a retrospective operation, where giving them a retrospective operation will operate unjustly or will deprive anybody of any right which he has already obtained.

Lord St. Leonards.—You say that the delegated power, if it extends as far as is contended by the Crown, if it extends to this case, is a power which Parliament itself, if it had retained the right, never would have passed.

Lord Cranworth.—There was a question when I was in the Court of Exchequer about the statute of wagers.

Mr. Mellish.—I have the case now before me, my Lord, and I was going to cite it. It is the case of Moore v. Durden. It is in the Second Exchequer Reports, page 22. The marginal note is:—"The 18th section of the 8th and 9th Victoria, chapter 109, "which received the Royal Assent on the 8th of August 1845, "enacts that,—'All contracts and agreements by way of gaming "or wagering shall be null and void; and that no suit shall be "brought or maintained in any Court of Law or Equity for "recovering any sum of money or valuable thing alleged to be "won upon any wager, or which shall have been deposited in "the hands of any person to abide the event upon which any

" wager shall have been made.' Held, per Parke, B., Alderson, B., " and Rolfe, B., (Platt, B., dissentiente,) that the statute had not " a retrospective operation so as to defeat an action for a wager " commenced before the statute passed," and the majority of the Court were, I think, also of opinion that even the wager must have been made after the Act in order that the statute might operate.

Lord Chancellor.—Were the words "brought and maintained," or "brought or maintained."

Mr. Mellish.—The section was, that "All contracts aud agree- " ments by way of gaming or wagering shall be null and void; " and that no suit shall be brought or maintained in any Court " of Law or Equity for recovering any sum of money or valuable " thing alleged to be won upon any wager."

Lord Chancellor.—Were the words "or maintained" remarked upon.

Mr. Mellish.—There is a very elaborate judgment by the different learned Barons; and Mr. Baron Rolfe says, that "the " effect of this clause is to make void all wagers, and to prevent " the bringing or maintaining any action for the recovery of " money, even on any wager; and the only question is, whether " its operation is retrospective, so as to affect past transactions " and existing suits. The general rule on this subject is stated " by Lord Coke in the Second Institute, 292, in his Commentary " on the Statute of Gloucester, '*Nova constitutio futuris formam* " *imponere debet, non preteritis*,' and the principle is one of " such obvious convenience and justice that it must always be " adhered to in the construction of statutes, unless in cases where " there is something on the face of the enactment putting it " beyond doubt that the Legislature meant it to operate retro- " spectively. On the part of the defendant it was argued, that " in this statute the clause must have been intended to affect " past transactions, because it not only enacts that wagers shall " be null and void, but, further, that no suit shall be brought or " maintained for the recovery of money won on a wager. The " latter branch of the clause it was contended would have no " operation if the enactment were restricted to future wagers, " for it would be useless to enact that no action should be brought, " and still more so, that no action should be maintained in respect " of a contract already declared to be null and void; and parti- " cularly the enactment that no action should be maintained, " must, it was said, apply not only to wagers already won, but " even to suits already pending for their recovery. It must be " observed that this latter part of the enactment—that, I mean, " which prohibits the bringing or maintaining of actions—is in " no respect inconsistent with the construction which gives to " the enactment an operation merely prospective. The most " that can be contended is, that the words in question are " unnecessary; and therefore, independent of authority, if the " argument rested here, what we should have to decide would " be, whether the improbability that the Legislature should

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" unnecessarily prohibit the bringing or maintaining an action " on a contract already made void in a prior part of the same " clause is so great as to warrant us in saying that it must have " been intended retrospectively to affect rights already vested." He says, that the Act should be construed entirely to apply to wagers made after the passing of the Act, and that all wagers made after the passing of the Act should be null and void, and that no action should be brought or maintained upon such wagers.

Mr. Baron Rolfe then goes on to say: "I think this would be " a very unreasonable and strained inference, and which, con- " sidering the ordinary frame and language of Acts of Parliament, " would be by no means fairly deducible from the clause in " question. But the argument of the defendant did not rest on " general reasoning only;" and then the different cases upon the subject are gone through.

Lord Chancellor.—Here is a question as to the construction of a power, and whether it would be reasonable to hold that the power was intended to apply to pending matters without there being any express words for the purpose.

Mr. Mellish.—No doubt, my Lord. I would not put it quite on pending matters, for there are several cases which will be cited, I dare say, by my learned friend the Attorney General, showing that, generally, alterations in procedure may apply to existing suits. I should not therefore say that it may not apply to a pending proceeding; for instance, that it would not apply to a trial had after the passing of the rule, supposing that the rule were in other respects valid, although the proceeding might have been commenced before. But I should say that it would not apply where it would not apply equally to the two parties; where one of the two parties has already in the course of the litigation obtained an advantage of which he would be deprived by the alteration in the procedure; in short, the alteration in the procedure, in order to be applicable, must be applicable equally to both parties, and it could not be supposed to be intended to give to one party an advantage over the other, depriving the one party of an advantage to which he was entitled. The other construction, I submit, would have an effect which I cannot help thinking would be very unadvisable, in this respect, that it would make it possible for the future to make a rule for the express purpose of influencing existing suits, and for the express purpose of giving an advantage to one party; because here the learned Attorney General, after the subject had obtained a verdict, came and asked the Court of Exchequer to make a rule by which that verdict should be set aside, in a way in which that verdict could not have been set aside at the time that the verdict was obtained.

Now, my Lords, in this case Mr. Baron Parke says, as you will see in this case, that you are not to look in this case to the mere language of the clause, because he says that "The language of " the clause, if taken in its ordinary sense, as in the first instance

" we ought to do, applies to all contracts, both past and future, " and to all actions, both present and future, on any wager, " whether passed or future; but it is, as Lord Coke says, 'a rule " and law of Parliament that regularly *novâ constitutio futuris* " *formam imponere debet, non præteritis.*' This rule, which is in " effect that enactments in a statute are generally to be con- " strued to be prospective, and intended to regulate the future " conduct of persons, is deeply founded in good sense and strict " justice, and has been acted upon in many cases. For instance, " in the construction of the Statute of Frauds, which was held " not to apply to promises made before the 24th of June 1677; " Gilmore v. Shuter; and also of the statute of the 2nd and 3rd " Victoria, Chapter 29, which it has been decided is not to be " construed to defeat a right by relation already vested in " an assignee of a bankrupt; Edmonds v. Lawley; Moore v. " Phillips. But this rule, which is one of construction only, will " certainly yield to the intention of the Legislature." He goes on to say, "It seems a strong thing to hold, that the Legislature " could have meant that a party who, under a contract made prior " to the Act, had as perfect a title to recover a sum of money as " he had to any of his personal property, should be totally de- " prived of it without compensation." Your Lordships see that at the time when this rule was made the verdict was already obtained, and we were entitled to the postea; we were entitled to enter up our judgment. It must be taken as if there had been no bill of exceptions tendered at the trial; the fact that it had is an immaterial matter, because in the construction of the rule it must be just the same in fact as if no bill of exceptions had been tendered. That verdict could only be set aside by a motion for a new trial, and the judgment of the Court of Exchequer. Now the effect of the rule is, that it may also be set aside by the judgment of the Court of Exchequer Chamber and by the House of Lords.

My Lords, I will shortly call your attention to another case upon this question of its being retrospective, and that is the case of Pinhorn v. Souster, which is in 8th Exchequer Reports, page 138. The decision there was that pleadings specially demurred to before the Common Law Procedure Act came into operation are not affected by its provisions. It is said that no pleadings should be held to be bad upon the ground of any matter which only could be raised by special demurrer. That was held not to apply to any case where a special demurrer had been put in before the Act passed. I apprehend that it was upon the same footing which I contend for, namely, that the party who had already put in his demurrer had got a vested right, so to speak, to have the question between him and his opponent determined according to the rules existing at the time that he put in his demurrer. It was not a decision that it would not apply to existing suits. No doubt it would apply to existing suits, but it would not apply when that particular proceeding which was to be effected by it had already commenced.

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Now, my Lords, I will address myself to what is the main question before your Lordships. The question turns entirely upon the construction to be put upon the last part of the 26th section of the Queen's Remembrancer's Act. I apprehend that it really turns upon what is the meaning of the words "Revenue "side of the Court," and what is the meaning of the words "process, practice, and mode of pleading." Do the words "Revenue side of the said Court" apply exclusively to the Revenue side of the Court itself, or do they include the Court of Exchequer Chamber and the House of Lords when sitting in Appeal in cases from the Revenue side? A power is given to extend, apply, and adapt any of the provisions of the Common Law Procedure Act to the Revenue side of the Court, as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side of the Court. Do the words "process, practice, "and mode of pleading," and the application of them in that section, apply to giving new rights of appeal, or do they only apply to what in ordinary terms would be called the practice, process, and mode of pleading itself?

Now I shall submit to your Lordships that according to the true construction of this 26th section it does not give to the Barons of the Exchequer any power either to give any new right or to take away any new right at all. All the power that it gives to them is this, that where there substantially exist the same proceedings upon the Revenue side and the Plea side of the Court of Exchequer there they may make the rules, by which those proceedings are carried out, uniform, and they may make the actual practice respecting them uniform. But it does not apply so as to enable them to give any new right, or to take away any old right at all. Now that the process, practice, and mode of pleading on the Revenue side cannot be made altogether uniform with the process, practice, and mode of pleading upon the Plea side I think will be evident enough, because, if your Lordships turn to any number of the provisions of the Common Law Procedure Acts, you will find how totally inapplicable many of them are to these Revenue matters, and what strange and extraordinary effects would be produced if any attempt was made to apply them to proceedings on the Revenue side. Take, for instance, the 2nd section of the Common Law Procedure Act, 1852. It is at the very commencement of the Act, "that "all actions in the Superior Courts of Common Law shall be "commenced by writ of summons." Could the Barons of the Exchequer apply that to the Foreign Enlistment Act? Could they say that, instead of the proceedings under the Foreign Enlistment Act commencing by the seizure of the ship, they should commence by a writ of summons, the effect of which would be that the ship would immediately depart, and the Act would be rendered altogether nugatory? Was it intended that by having power over the practice, the pleadings, and matters of that

kind, the Barons of the Exchequer should be at liberty to make what would be substantial alterations in the law, altering the rights of parties altogether. I have put an instance of a process which, if applied to a Revenue action, would most seriously affect the rights of the Crown, and I might put another instance in which it would affect the rights of the subject. Could they, for instance, apply the power of issuing injunctions to the proceedings upon the Revenue side of the Court of Exchequer? What would be the effect if they did that? Why, my Lords, it is contrary to the rules of law, and to the general principles of law in this country, that there should be any injunction in criminal matters; that there should be any injunction to prevent a party from committing a crime; and the reason of that is this, that a party who is charged with an offence is entitled to have his innocence or guilt of that offence tried by a jury; therefore you cannot have an injunction, and there never has been a power to issue an injunction, upon criminal matters, and to restrain criminal proceedings. It never could have been intended that the Barons of the Exchequer should have that power in a matter of that kind simply because the Common Law Procedure Act says, that injunctions may be issued to adapt a rule of that kind to proceedings in Revenue cases, and so to make a most material alteration in the law.

I apprehend that the true rule of construction of this section is, that it was never intended that the Barons of the Exchequer should make any substantial alteration in the rights of the parties. All that was intended was, that where there were two analogous proceedings, as, for instance, where there was an appeal, then they may make the mode and form of the appeal, and the proceedings in the appeal, similar upon the Revenue side and upon the Plea side; or that where there was to be a trial by a jury there they may make the jury process, the form by which the jury is summoned, and all the proceedings connected with that, similar upon the Plea side and upon the Revenue side. But it never was intended that they should have the power to make any substantial alteration in the rights of parties, such as would be effected by giving a new right of appeal or taking away a right of appeal.

There is a section to which I think your Lordships' attention has not been called, which seems to me to show very strongly that that was the intention of the Legislature, and that is the last clause of the Queen's Remembrancer's Act, the 22d and 23d of Victoria, chapter 21. The words are these: "Save as herein "expressly provided, nothing in this Act shall affect or pre- "judice the jurisdiction or authority of the Court of Exchequer, "or of the Commissioners of Her Majesty's Treasury, or any "right or privilege now exercised by Her Majesty's Attorney "General on behalf of the Crown."

Now your Lordships see that it says in this section that nothing shall affect or prejudice the jurisdiction or authority of the Court of Exchequer, save where it is expressly provided by

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the Act. Now I apprehend that one portion of the jurisdiction or authority of the Court of Exchequer was that its jurisdiction was to be final, except where there might be error upon the record. At the time when this Act passed, the jurisdiction and the authority of the Court of Exchequer in all matters relating to the Revenue, and in all matters relating to the Foreign Enlistment Act, was final and conclusive, unless there was actual error upon the record itself. To some extent the Legislature expressly altered that, and gave a right of appeal by way of a bill of exceptions, that limited their authority, and in cases where a bill of exceptions was tendered, took the decision away from the Court of Exchequer, and gave it to the Court of Exchequer Chamber and to the House of Lords. So also in special cases stated by consent, the Legislature expressly took away the final authority of the Court of Exchequer, and gave a right of appeal to the Court of Exchequer Chamber and to the House of Lords; but the Legislature have not thought fit to take away the authority of the Court of Exchequer finally to decide the question upon a motion for a new trial. Then the clause which I have read to your Lordships says, that, save as in that Act expressly provided, the authority and jurisdiction of the Court of Exchequer is not to be interfered with by this Act, and the Act is not to be construed to interfere with them. I submit that that section would prevent the power of appeal from the Court of Exchequer being given, except where it is given in express terms by the Act itself.

Now, my Lords, upon the provisions of this latter clause of the 26th section, must not my learned friend the Attorney General persuade your Lordships that the words "Revenue side of the said Court" extend to the Court of Exchequer Chamber and to the House of Lords when sitting in appeal upon a revenue cause? If the words "Revenue side of the said Court" mean only the Revenue side of the Court itself, is it not then clear that there was no power to make these rules? The words are, "that they have power to adapt," and so on, any of the provisions of the Common Law Procedure Act to the Revenue side of the Court, for making the process, practice, and mode of pleading in the Revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side of such Court. Now, if "the Revenue side of the Court" means the Revenue side of the Court itself, and not the Courts of Appeal sitting in Error from the Revenue side, and if "the Plea side of the Court" means only the Plea side of the Court itself, and not the Courts of Appeal when sitting in Error upon the Plea side, then the process, practice, and mode of pleading may be made, as far as can be, uniform notwithstanding that there is the right of appeal in the one case and no right of appeal in the other case. If those words are confined to the Revenue side of the Court itself, there will be no difference in the process, practice, and mode of pleading upon the two sides of the Court; because in the one case there is the appeal and, in the other case there is not. Suppose that

an Act of Parliament were passed which said that no appeal or Writ of Error should be brought in any action at Common Law unless the matter in dispute exceeded a hundred pounds; many persons might think that that would be a very convenient provision. Would that make the process, practice, and mode of pleading in the Court itself different in the case of actions above a hundred pounds from what it would be in the case of actions for less than a hundred pounds? Surely the process, practice, and mode of pleading in the Court itself would remain exactly the same as respects actions for sums under a hundred pounds and as respects actions for sums above a hundred pounds, notwithstanding the fact that there might be the right of appeal in the one case and no right of appeal in the other. No doubt if you looked at the whole operation of the suit there would be a difference between the one and the other; but so far as regards the process, practice, and mode of pleading in the Court itself that would not be varied at all, because there was an appeal in the one case and no appeal in the other. Therefore I say that if the words "the Revenue side of the said Court" are confined, as they must be confined, to the Revenue side of the Court itself, then there was no power to make these rules.

Now, my Lords, it is admitted (or at least, whether admitted or not, it cannot reasonably be disputed,) that the words "Re-"venue side of the Court," in the first part of the section, do mean, and do mean only, the Revenue side of the Court itself. That they can only have that meaning in the first part of the section is plain from this, that if the words "Revenue side of "the Court" in the first part of the section included the Court of Exchequer Chamber and the House of Lords when sitting in Error from the Revenue side, it would follow that the Barons of the Exchequer might alter and vary the rules of practice in this House and in the Court of Exchequer Chamber when sitting in Error on the Revenue side, whenever they pleased. If the words "practice, process, and mode of pleading," and the making of rules for process, practice, and mode of pleading, include giving new appeals, it would follow that the Barons of the Exchequer could give the right of appeal, and take away the right of appeal, whenever they please. That is admitted on all sides to be absurd; it is impossible to suppose that any such power was intended to be given. Therefore it follows, that making rules respecting the process, practice, and mode of pleading on the Revenue side of the Court does not include giving rights of appeal from the Revenue side to the courts of appeal. But if it does not include that, how then can you get out of the subsequent part of the section any power to give the appeal in question? If you construe the words "Revenue side of the said Court," and "process, practice, and mode of pleading," in the same manner in the second clause of the section as you do in the first clause of the section, how can you get out of that anything which says that there is the power to give a right of appeal?

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Lord Chancellor.—What was the necessity for the second part of the section?

Mr. Mellish.—My Lord, I would first of all make this observation, that the mere fact of the Legislature according to our constitution repeating the same thing, even if there is no necessity for it, does not afford very strong argument against it. I would call your Lordship's attention to this, that the second part of the clause does not apply only to the Common Law Procedure Acts, but that it applies also to the rules of process, practice, and mode of pleading on the Plea side of the said Court. The words are, "to extend, apply, or adapt any of the provisions of the "'Common Law Procedure Act, 1852' and the 'Common Law "Procedure Act, 1854,' and any of the rules of pleading and "practice on the Plea side of the said Court to the Revenue side "of the said Court, as may seem to them expedient for making "the process, practice, and mode of pleading on the Revenue side "of the said Court as nearly as may be uniform with the process, "practice, and mode of pleading on the Plea side of such Court."

Lord Chancellor.—That might have been done under the first part of the section.

Mr. Mellish.—I say, my Lord, that it plainly might have been done. It is impossible to say, so far as regards any of the rules of process, practice, and mode of pleading, that this second part of this section gives any authority which was not given by the first part of the section. The Barons of the Exchequer are from time to time to make any rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer; therefore they might have adapted, applied, or extended any of the existing rules of the Plea side of the Court to the Revenue side of the said Court; that portion of it unquestionably gives no additional power beyond what was given before, and the only ground on which I should submit to your Lordships, that there can be any difference between the two clauses was what was suggested by my learned friend Sir Hugh Cairns, that as respects the first portion of the 26th section they were intended to have power to apply from time to time, and to alter, revoke, and amend rules. As respects the provisions of the Common Law Procedure Acts, and as respects the existing rules of pleading and practice upon the Plea side of the Court of Exchequer, when they were once applied to the Revenue side, it was not intended that they should be altered.

Lord St. Leonards.—The words "from time to time" are repeated in the second part of the section. The nature of the power to be exercised, if they have it, may show that the thing ought to be final. But you must consider that the words "from time to time" are repeated.

Mr. Mellish.—If that is so, my Lord, of course that forms the strongest argument against the construction contended for by the Crown, because if that were so the Court of Exchequer might have made a rule giving the right of appeal, and after

the Court of Exchequer Chamber had decided upon the appeal they might have made a new rule taking the appeal away from the House of Lords.

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Lord St. Leonards.—There is no doubt that the second part of the section includes part of what might have been done under the first. Then the second part of the section does expressly refer to the Barons taking any of the provisions which are applicable to the Common Law Procedure Act. The question upon that construction would be, whether those which they do take must not be *in pari materia*, because beyond all question there are a great many provisions in the Common Law Procedure Acts which, although they have the right to choose, they would not select; but it would be more consistent, no doubt, to hold that they must be similar provisions to the others. If they were it would be very much in favour of your argument, but I am not giving any opinion upon that.

Mr. Mellish.—What the Court was to do with them was to apply them to the Revenue side of the Court, and they must be rules relating to the process, practice, and mode of pleading, because they are only to do it for the purpose of making the process, practice, and mode of pleading as nearly as may be uniform on the two sides.

Lord St. Leonards.—If they can only take out of the Common Law Procedure Acts such things as they would be at liberty to take from the common and general law of process, practice, and mode of pleading, then of course the argument is very much in your favour. They are at liberty to go out of the Common Law Procedure Acts; but going within the Common Law Procedure Acts they must make rules *ejusdem generis*, and then they would bring the whole harmoniously into one. Do you follow me?

Mr. Mellish.—Yes, my Lord; but how can you extend, as far as regards the subject matter, the latter part of the clause beyond the first part of the clause, unless you construe the words "Revenue side of the said Court," and the words "process, prac- "tice, and mode of pleading upon the Revenue side of the said "Court," in the latter part of the clause, as having a different meaning from that which they have in the prior part? If the words "process, practice, and mode of pleading," and the words "Revenue side of the said Court," in the latter part of the clause, mean the same thing as they do in the first part of the clause, how can the latter part be extended beyond the first part as regards the subject matter? And how can you construe them to be different, the one from the other.

Now, my Lords, that is what I have to say upon the construction of that section of the Act itself. Then we say that the 19th section very strongly confirms our contention, that the 26th section is confined exclusively to the proceedings of the Court itself, and does not extend to proceedings in the Courts of Error, because in the 19th section the Legislature have already laid down the extent to which they think the Barons of the Court of Exchequer ought to have power to make rules with reference to

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proceedings in error. The language of the 26th section, it must be admitted, does not in itself refer to the proceedings in error at all. There is no mention of the Court of Exchequer Chamber or of the House of Lords, or of any proceedings in error. It is in terms confined only to the proceedings in the Court below, and to the power to make rules with regard to proceedings in the Court below. But when you find that the Legislature have already dealt in the same Act of Parliament with the proceedings in error, and have already given to the Barons of the Exchequer a certain limited power to make rules with reference to proceedings in error, does not that go very strongly to show that it was not intended that they should have any power under section 26 to make rules respecting proceedings in error? Because you see that by the 19th section it is, "proceeding in "error on the Revenue side of the Court of Exchequer, and the "proceeding to error shall be a step in the cause, and shall be "taken in manner and subject as to such terms and conditions "as to giving bail or security as may be directed by any rule or "order made by the Barons."

Lord Chancellor.—How do you limit those words "in manner?"

Mr. Mellish.—I should say, my Lord, that those words gave the Barons power to adopt all the sections respecting error which are consequent upon the proceeding to error being a step in the cause.

Lord Chancellor.—"In manner" must mean the same as "in such manner."

Mr. Mellish.—Just so, my Lord.

Lord Chancellor.—Might not that warrant an appeal from a judgment refusing a new trial?

Mr. Mellish.—No, my Lord. I submit to your Lordship, that if you read the whole of the section it does not. A writ of error shall not be necessary or used in any suit or proceeding in error on the Revenue side of the Court of Exchequer, and the proceeding to error shall be a step in the cause, and shall be "taken," (that is existing proceedings in error which may be already taken, either under this or under any other Act,) "in "manner and subject as to such terms and conditions as to "giving bail or security as may be directed by any rule or "order made by the Barons under this or any other Act or "Acts of Parliament." That is to say, the writ of error being abolished, they may direct the manner in which the proceedings in error are to be taken; they may abolish the assignment of error and joinder in error, which was a mere form, and they may substitute the notice in error; they may in fact adopt, I should say, all the provisions upon that point. Your Lordship sees that the beginning of the section is taken from the 148th section of the Common Law Procedure Act of 1852: "A writ of error "shall not be necessary or used in any cause, and the proceed-"ing to error shall be a step in the cause, and shall be taken in "manner herein-after mentioned," and so forth; and then there

are following that a variety of provisions respecting the manner in which error may be brought.

Lord Chancellor.—The 148th section goes on to say that "the "proceeding to error shall be a step in the cause, and shall be "taken in manner herein-after mentioned;" and the 19th section of the Queen's Remembrancer's Act says, that it "shall be a step "in the cause, and shall be taken in manner and subject as to "such terms and conditions as to giving bail or security as may "be directed by any rule or order made by the Barons,"

Mr. Mellish.—Yes, my Lord. Then that would clearly show that the Barons might adopt the subsequent sections 149 and 150, which relate to the manner in which error is to be brought, as directed by the Common Law Procedure Act.

Lord Chancellor.—Your observation was that the express terms of the 19th section excluded the possibility of holding that the 26th section applied to error. I only want you to deal with those words to which I call your attention.

Mr. Mellish.—My Lord, what I submit is, that the power to make rules, which is given by the 19th section with reference to proceedings in error, is quite sufficient for any purpose for which the Barons were required to make rules with reference to proceedings in error, because your Lordship will observe what the 149th section goes on to say, "Either party alleging error in law "may deliver to one of the Masters of the Court a memo-"randum," and so forth; and then it deals with bail in error; and then there is to be a suggestion instead of assignment and joinder in error, that is section 152; and then there is the mode as to how the roll is to be made up.

Lord St. Leonards.—I see that there is a provision which bears upon the former part of the argument as to how the orders shall come into operation. There is an express saving clause at the end of that 19th section: "Provided that nothing herein "contained shall invalidate any proceedings already taken or to "be taken by reason of any Writ of Error issued before the "commencement of this Act, or before such rules and orders "come into effect." That refers not only to the Act, but to the rules and orders which might be made under the Act. There is another matter as to which I do not know that it has been observed upon, but I may have missed it, with respect to sections 26 and 27. If section 26 is intended to have the extended operation for which the Crown contends, it is singular that the power should have been there confined to the Chief Baron, and two or more Barons; while in the 27th section, which deals on with forms of writs, the Lord Chief Baron, and the Barons generally, should all have been required to make the alterations, so that matters of form required all the Court, but matters of Legislation, for that is what in fact it is, could have been executed by three of the Judges.

Mr. Mellish.—Surely, my Lord, it is what one would expect in the Legislature, that the power to make rules with reference

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to Courts of Error should be more limited than the power to make rules with reference to the Court itself. And that I submit is what accounts for the limited power to make rules which is given by section 19, and the more extended power to make rules which is given by section 26. As respects the Court itself, you would naturally expect a much more extended power over the practice and pleadings in the Court than would be given to the Barons of the Exchequer over Courts of Error setting on causes coming from their own Court. Therefore you find that their power by the 19th section is confined to making rules respecting the manner in which proceedings in Error shall be brought, and it does not give them any power to make rules over what I may call the practice of the Court of Error itself. The Court of Error is to regulate its own practice, and no power to interfere with that is intended to be given to the Barons of the Exchequer. But as respects their own proceedings, one would naturally have expected that they should have a very much more extended power; and yet if the construction contended for by the Crown is correct, first of all the power to make rules under the 19th section is entirely superfluous, and would have been included in the power given by section 26, and next if the process, practice, and mode of pleading on the Revenue side does apply to the Courts of Error, there is given apparently to the Barons of the Exchequer the power to make rules respecting the practice of Courts of Error which it is very extraordinary that they should have. I cannot see how, if the contention on the part of the Crown is right, it must not be admitted that the Barons of the Court of Exchequer have power to regulate the practice of Courts of Error when sitting in error upon the Revenue side of the Court of Exchequer. But if you construe the 19th section as containing the only power to make rules in respect of error, and the 26th section as containing the power to make rules in the Court itself, then the two sections are perfectly consistent with each other. Each deals with its own matters, and deals with them as one would expect, giving a narrowly confined power to make rules with regard to Courts of Error, and giving a more extended power to make rules with regard to the process, practice, and pleading of the Court itself.

Now, my Lords, the learned Judges in the Courts below have relied greatly upon the provisions of the Common Law Procedure Act, which they say make the word "Courts" and the words "Courts of Common Law at Westminster" include the Courts of Error as well as the Courts below, and they make the process, practice, and mode of pleading of the Courts below as they say include the process, practice, and mode of pleading of the Courts above. Now when you really examine the Common Law Procedure Acts themselves, I think it will be found that the Acts do nothing of the kind. That the Acts are perfectly correct in invariably distinguishing between the Courts of Error and the Courts below, and that the Courts of Error are never mentioned,

and they are never included, except when they are mentioned in express terms.

Now, my Lords, my learned friend Sir Hugh Cairns has already pointed out to your Lordships, that though the learned Judges, especially the Lord Chief Justice, used language in their judgment which would lead one to suppose that the words "process, practice, and mode of pleading" are repeatedly used in the Common Law Procedure Act, in point of fact they are used nowhere except in the recital to the Act of 1852 and in the title to the Act of 1854. Now in the recital to the of Act 1852, do they intend to include the Courts of Error as well as the Courts below, with regard to the expression process, practice, and mode of pleading?

Lord Chancellor.—I do not think you need go much into that.

Lord St. Leonards.—You cannot take titles of Acts as operating much upon the construction of the words in the sections, nor can you take a preamble against what you find in a positive enactment.

Lord Chancellor.—The title of an Act is quite of modern introduction.

Mr. Mellish.—Then, my Lord, I would only just read to your Lordships what the 227th section itself says. "In the construc-" tion of this Act the word 'Court' shall be understood to " mean any one of the superior Courts of Common Law at " Westminster in which any action is brought." So that the Act itself puts a construction upon the word "Court," the meaning of which is that the word "Court" shall not include Courts of Error, because it is to mean any one of the superior Courts of Common Law at Westminster in which any action is brought; and does not "the Revenue side of the said Court" in the said Queen's Remembrancer's Act bear the same meaning? Does it not mean the Court in which the proceeding is commenced; the Court of first instance? and that is followed throughout the Act. My learned friend the Attorney General I am certain cannot show a single section in the Common Law Procedure Act of 1852, or in the Common Law Procedure Act of 1854, where the word "Court" or the words "superior Courts of Common Law at Westminster" are used so as to include Courts of Error. I say that in every single section, and without a single exception wherever the Courts of Error are intended to be included, they are included in express terms.

Well then, my Lords, does the making of rules respecting the process, practice, and mode of pleading in any ordinary sense of the term include giving a new right of appeal? Are we here discussing a question of practice or a question of jurisdiction? If this rule is a valid rule, is the practice of the Court below altered, or is the practice of this House altered, or is the jurisdiction of this House as a Court of Appeal enlarged? Surely nobody using any plain or ordinary language would say that the effect of this rule was to alter the practice of the Revenue side

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of the Court of Exchequer, or that the effect of this rule was to alter the practice of the House of Lords. Surely, my Lords, anybody would say that the effect of this rule was to give a new right; that the effect of this rule was to enable the House of Lords to hear an appeal upon matters on which they could not otherwise hear before an appeal; that the effect of this rule was to give a new jurisdiction.

Lord St. Leonards.—The contention upon the other side is, that the Barons can give the right of an appeal to this House; but it is not pretended that there was any power to regulate the proceedings in this House. But although they cannot regulate the proceedings, when a case reaches this House they may give the power for the first time to come to this house by way of appeal.

Mr. Mellish.—Yes, my Lord, that is the argument adduced; but in any ordinary language is that, included in the meaning of a rule respecting practice? Is that adopting a provision respecting practice, or is it giving a new right of appeal?

Adjourned to to-morrow at half past ten o'clock.

ARGUMENT—*continued.*

Tuesday, 15th March 1864.

Mr. Mellish.—My Lords, the first observation I wish to make to your Lordships this morning is once again to call your Lordships' attention to the 26th section of the Queen's Remembrancer's Act, with a view of suggesting what I think may be the true explanation respecting the reasons why we find two powers to make rules in that section, one, a power at the discretion of the Barons, another, a power in which they are to follow the provisions of the Common Law Procedure Acts; and that is this, all proceedings upon the Revenue side of the Court of Exchequer may be divided into two classes perfectly distinct from each other; proceedings *in rem*, and proceedings *in personam*. As far as regards proceedings *in personam*, they are precisely analagous to actions in the Courts of Common Law. They are, in fact, actions at the suit of the Queen to recover debts due to the Crown, to recover damages for breaches of contract with the Crown, to recover damages for injuries to the property of the Crown, to recover possession of the property of the Crown wrongly detained by a subject. They are simply actions in which the Crown is plaintiff. As far as regards actions of that nature, except in one or two peculiar matters arising from the prerogative of the Crown, such as the right of the Attorney General to have the last word, and so on, they are precisely analagous to common actions, and there seems no reason why the whole procedure of the Common Law Procedure Act in other Courts should not be applied to them, just as has been done with regard to petitions of right, where by the Legislature itself the Common Law Procedure Act has been applied.

As respects proceedings *in rem* the case is totally different. The larger part of the proceedings on the Revenue side of the Court of Exchequer are proceedings *in rem*, and commence by the seizure of the *res*,—the ships, or whatever else it may be, upon the alleged ground that they are forfeited to the Crown. When that seizure has taken place any person who alleges that he has an interest in them, and makes an affidavit that he has an interest in the thing seized, may come forward and claim it. And then there are proceedings by which the question whether it has actually been forfeited or not is tried between the claimants and the Crown. But in those proceedings, if you look at them, there is no plaintiff. I know that if you look at this very case, which is a proceeding *in rem*, it does so happen that the persons who are the claimants are among the persons charged with having been the persons who equipped the ship and occasioned the forfeiture.

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But that is a matter totally accidental; but a large number of other persons, including persons unknown, are charged also. It might have happened that the person claiming the ship had nothing whatever to do with the cause of forfeiture. Therefore, proceedings *in rem* are totally distinct, both as to the procedure with which they begin, as to the necessary pleadings with which the cause is conducted, and as to the execution which takes place at the end of the proceedings, because the nature of the execution, if the defendant gets the verdict, is, that a writ of *dimoveas manus* as to the thing is issued.

Lord Kingsdown.—It is not a writ of *dimoveas manus*, I think.

Mr. Attorney General.—No, my Lord; it is a writ of delivery.

Lord Cranworth.—It is substantially the same thing.

Mr. Mellish.—Yes, my Lord. Therefore, what I suggest to your Lordships is this, that the reason why we find the two descriptions of rules in the 26th section of the Common Law Procedure Act is this, that the first power to make rules as to the "process, practice, and mode of pleading on the Revenue side of "the Court of Exchequer," at the discretion of the Barons, was intended mainly to apply to proceedings *in rem*, with respect to which the Common Law Procedure Act contains no provisions at all. Your Lordships are aware that the Common Law Courts have no jurisdiction at all in cases *in rem*; their jurisdiction is entirely *in personam*. The Court of Admiralty is the only Court which has a jurisdiction in cases of proceedings *in rem*. The rules of process, practice, and mode of pleading, which you find in the Common Law Procedure Act, and which you find in the rules of the Court of Exchequer upon the Plea side, are all rules with reference to proceedings *in personam*. Therefore, what I suggest to your Lordships is, that the reason why you find two powers given to make rules in the 26th section is, that it was intended that the Barons, with reference to proceedings *in rem*, where the Common Law Procedure Act would afford no guide, should have the power to make rules relating to process, practice, and pleading. But as respects proceedings *in personam*, where the Common Law Procedure Act would be strictly analogous, and might be made in most respects to apply, there it was intended that they should have the power to adopt the rules of the Common Law Procedure Act, so as to make the practice at the suit of the Crown similar in its procedure to the practice at the suit of a subject.

Now, my Lords, if that is the true explanation of the reason why you find this double power to make rules, then there will not be the slightest necessity that the words "process, practice, "and mode of pleading," in the first clause of section 26, should bear any different meaning from what they bear in the second clause. There would be no reason why the "Revenue side of the "Court" should not be interpreted to mean the same in both parts of the clause. The power to make rules in the first part is just as extensive as the power given in the second part, and

the only reason why the provisions of the Common Law Procedure Act are applied to the first part and not to the second is because they are only applicable to the particular subject of proceedings *in personam*. Therefore, that view of it confirms what we contend for, namely, that the 26th section relates exclusively to what in ordinary language is process, practice, and mode of pleading in the Court itself, and that the Revenue side means the Revenue side of the Court of Exchequer itself, and nothing else, and that the proceedings in error are not recognized by the 26th section at all, the only power giving the right of making rules respecting proceedings in error being the power contained in section 19.

I submit, my Lords, that that will account for what I said in addressing your Lordships yesterday seeming somewhat unaccountable, namely, why, besides introducing the provisions of the Common Law Procedure Act in the second power to make rules the Legislature also introduce into the section the words "any of the rules of pleading and practice upon the Plea "side of the said Court." Of course the rules as to pleading and practice upon the Plea side of the Court relate exclusively to actions *in personam*, because there are no actions *in rem* upon the Plea side of the Court. Take the instance of the rules of pleading in an action of trespass brought by the Crown. You might adapt those rules, and in an action of breach of contract might very easily adapt them, to an action for a breach of contract brought by the Crown; but you could not adapt the rules of pleading established with regard to a personal action to the pleas in a proceeding *in rem*, the two things being distinct in their nature. Therefore, as it is quite clear that the rules of pleading and practice upon the Plea side, where they occur in the second part of the rule, are intended exclusively to refer to rules for pleading in actions *in personam*. I submit that the provisions of the Common Law Procedure Act are also so intended, and that this is the true explanation why you find two powers given in this section to make rules.

Now, my Lords, I wish to make one observation with reference to a question which was put by Lord Wensleydale to my learned friend, Sir Hugh Cairns, namely, whether there was any authority for saying that a right of appeal can only be given by express words. Now, my Lords, I will read what I find in Mr. Dickinson's Guide to Quarter Sessions, 5th edition, at page 626. There it is said, "Appeal, according to the "general use of the word, signifies a complaint to a superior "tribunal of the erroneous judgment of an inferior one, and is "in the nature of a writ of error brought in order to avoid or "quash it. The only application of this remedy with which "we have any concern here is in reference to its use in bringing "the orders or convictions of justices acting out of General or "General Quarter Sessions to the review of those tribunals." "The right of appeal is a qualified right."

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Lord Chancellor.—What are the cases cited?

Mr. Mellish.—I am going to cite the cases, my Lord.

Lord Chancellor.—That is not altogether the sort of book to to read to the House, is it?

Mr. Mellish.—There are several cases cited, my Lord, in the note; but the clearest case on the subject is the case of the Queen against Stock, reported in the 8th volume of Adolphus and Ellis, page 405. The marginal note is this:—"The Church Building "Act, 59th George 3rd, chapter 134, section 39, empowers the "commissioners to order the stopping up of footways which "appear to them unnecessary, in churchyards, provided the same "be done with the consent of two Justices, and on notice being "given in the manner and form prescribed by Statute 55th "George 3rd, chapter 68. Schedule A. of that statute gives a "form of notice of an order for stopping up a useless of road, "and the form states that such order will be enrolled at sessions, "unless, upon an appeal against the same, to be then made, it be "otherwise determined. Section 3 of the same Act empowers "any party aggrieved by such order to appeal to the sessions, "upon giving ten days' notice to the surveyor of the highways. "Held, that Statute 59th George 3rd, chapter 134, section 39, "though incorporating the form of notice annexed to Statute "55th George 3rd, chapter 68, did not hereby give an appeal "against an order of the commissioners for stopping a footway; "for that an appeal cannot be given by implication only." I do not think it is necessary to go through the provisions of those sections, as I cited simply to show the principle upon which the Court decided it.

Lord Denman says, "as to the question whether or not an "appeal is given by the reference in Statute 59th George 3rd, "chapter 134, section 39, to the former statute, I confess I am "strongly of opinion that it was intended; but on the whole "I cannot say that is done." Your Lordships see that Lord Chief Justice Denman draws the inference that the Legislature intended to give an appeal, but he says because they do not say so in express terms there is no appeal. Chief Justice Abbott says, in Rex v. Hudson, (which is reported in the 4th volume of Barnewall and Alderson, page 521,) "speaking, not from any "authority, but from his own observation, that a right of appeal "cannot be implied, but must be given by express words." That is in Rex v. Hanson.

Lord Cranworth.—You are reading that from the judgment in the Queen v. Stock.

Mr. Mellish.—Yes, my Lord. Lord Denman, as the authority for what he says, cites what was said by Lord Tenterden, speaking, not from any authority, but from his own observation, that a right of appeal cannot be implied, but must be given by express words.

Then Mr. Justice Littledale says, "We cannot here intend a "power of appeal. I admit that the words of Statute 55th George "3rd, chapter 68, Schedule A., must be considered as if introduced "in Statute 59th George 3rd, chapter 134, section 39, and perhaps "if a power of appeal could be implied it would be so here; but "Chief Justice Abbott says, in Rex v. Hanson, that that power "cannot be given by implication."

Mr. Justice Patteson says, "The Act of 59th George 3rd stops "short of expressly giving an appeal. The dictum in Rex v. "Hanson, that a *certiorari* lies unless expressly taken away, but "an appeal does not lie unless expressly given, seems to be clear "law."

Mr. Justice Williams says, "There are innumerable instances "where an appeal is given in terms, but no case has been men- "tioned in which it has been given by implication. By the "reference to Statute 55th George 3rd chapter 68, on the subject "of notice, an appeal seems to have been contemplated, but it "should have been expressly given." That, as your Lordships will see, is a very clear decision of all the four Judges of the Court of Queen's Bench, adopting the previous decision of Lord Tenterden, that an appeal can be only given in express terms.

The only other part of the case to which I had intended to call your Lordships' attention was the judgments in the Court below of a majority of the learned Judges. Your Lordships' attention has been called, at very considerable length, to the judgments of the minority of the learned Judges who gave the decision in favour of the Crown. But after full consideration I do not think I should usefully occupy your Lordships' time in going through the judgments of the majority. I only refer to them now that it may not be supposed because we have not read them that we do not very strongly rely upon them; but the fact is that the judgments upon our side turned upon very simple matters and plain principles. The learned Judges say, "Process, "practice, and mode of pleading" must be taken in their ordinary meaning. An appeal ought to be given in express terms. It is not to be supposed that such an extraordinary power as the power to give an appeal from their own judgment is to be given to the Court of Exchequer by implication.

But there is just one single sentence of Mr. Justice Mellor's judgment, and one also of Mr. Justice Crompton's, which I will read to your Lordships, as they appear to me to contain the whole essence of the case. Mr. Justice Mellor says, at page 170 of the printed case, letter I., "There may be, and probably are, "considerations which might render such a power inexpedient "in Revenue suits; and it can scarcely be imagined that the "propriety of giving such a power escaped the consideration of "the Legislature when the special provisions above referred to "were framed. The omission of such a power, whilst other "provisions are made for appeal and writs of error, leads me "to the conclusion that this larger power of appeal was inten- "tionally omitted from the Act." Then his Lordship says, what

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I say contains the whole essence of the case, "The answer "attempted to be given to this view is that the *right of appeal* "is matter of practice, confounding, as it appears to me, the dis- "tinction between the right and the *rules* which regulate the "*right.*"

Mr. Justice Crompton, at page 180, letter F., says, "I think "that the words process, practice, and pleading in the 26th sec- "tion cannot, without great straining, be construed as delegat- "ing the power of creating a right to appeal. The right of "appeal can hardly be process or pleading; and as to the word "'practice' I cannot help thinking that there is a great diffe- "rence between the machinery of the appeal and the right of "appeal. The former might with less difficulty be called 'prac- "tice,' but I have great difficulty in seeing how the giving a "right to appeal is 'practice.'"

Lord St. Leonards.—That is identical with Mr. Justice Mellor's opinion.

Mr. Mellish.—Yes, my Lord.

REPLY.

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Mr. Attorney General.—My Lords, my learned friend Sir Hugh Cairns, at the outset of his address to your Lordships, made some observations which I have no doubt he thought pertinent and proper, as to the circumstances under which the rules now in question were made. I wish your Lordships to understand what those circumstances really were; whether or not I am right in supposing that your judgment in the case will not depend upon them. And in a very few words I will state what they were. Upon the first day of November Term, that is of Michaelmas Term, I appeared in the Court of Exchequer for the purpose and the sole purpose of asking for some enlargement of the usual time of four days which is allowed for making a motion for a new trial, on account of the difficulties which had arisen in settling any bill of exceptions, and having it properly signed. Upon that occasion it was intimated to me by the highest authority that there was no probability that those difficulties would be overcome; and the same authority intimated that it would probably be the better course to move for a new trial, and to take an appeal, if the matter should be decided upon any point of law, in the way provided by the Common Law Procedure Acts; the learned Judges being at the same time good enough to say that as far as it might depend upon the discretion of the Court I might be sure of a disposition upon the part of the Court to facilitate such an appeal, owing to the importance of the questions which might be involved.

But a point was then called to the attention of the Court, I think in consequence of a suggestion by my learned friend Mr. Jones, who was with me, which seemed to have escaped the minds of the Court at the time; namely, that the rules made in 1860, adapting the provisions of the Common Law Procedure

Act to the Revenue side of the Court of Exchequer to a certain extent, had not extended *quoad hoc;* and therefore that as the matter then stood——

Sir Hugh Cairns.—I do not remember that being said.

Mr. Attorney General.—What I mean is this; reference was made to the Common Law Procedure Act by my learned friend Mr. Jones. His meaning was of course that nothing had been done under the powers of the Queen's Remembrancer's Act which at that time made the appeal clauses of the Act of 1854 applicable to a proceeding of this kind. Then it was suggested that time should be taken to look into that matter, and that it should be mentioned again at a future day. Upon a subsequent day I stated to the Court that in compliance with the suggestion which had been made, that mode of proceeding having been strongly pressed upon us as the most desirable, we had looked into the matter, and it appeared that there was not then any power to appeal at all, as things stood; but it appeared to us that the Court might have power to make rules under the Queen's Remembrancer's Act, if it thought fit to do so, which if made before any motion had been made to the Court might have the requisite effect.

Lord Chancellor.—Was this on the next day?

Mr. Attorney General.—It was on the third day of term, or the 4th of November, that I appeared in Court, and said that that was the result of our examination into the matter. I did not otherwise ask the Court to take the course they did than this, that the matter having been suggested to me, and I having, in deference to the suggestion of the Court, endeavoured to ascertain what the state of the law was, stated my apprehension to be that at present there would be no appeal from any judgment from a motion for a new trial, but that it would be in the power of the Court, if they thought proper to do so, to make rules, which, if made upon that day, might have that effect. Of course if they had that effect it would be quite equal as regarded both parties. If there was a decision given against the Crown, then the change might be in favour of the Crown; if the decision upon the motion for a new trial were in favour of the Crown, then it would be the other way. All that I said beyond that was this, that of course I had not forgotten that in examining into such matters it was my duty not only to think of the present case, but also to think of any other cases which might arise. No reason had occurred to me, affecting either the subject or the Crown in general, which would make it inexpedient for their Lordships to make the rules, if they thought fit that such rules should be made; assuming that they had the power. Their Lordships expressed a strong opinion that in their judgment it was desirable, so far as they could then form an opinion upon the subject, that their order should be general in that respect, for the sake of uniformity of practice; and they intimated that the only reason, so far as they were able to judge,

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why this had not been done before was, that those who prepared the former rules, probably those acting on the part of the Crown, had not thought fit to desire it. Their Lordships then took the matter into their own hands entirely, and at a later part of the day the rules were issued in the form in which they appeared.

I was acting (I do not complain of it the least in the world) under a species of pressure put upon me by the Court. I was most unwilling to give up the remedy by bill of exceptions; but it was strongly urged upon me that I should not be able to overcome the difficulties which existed as to that, and that in this way justice would be completely done. I desire to get no advantage from referring to these circumstances in the present argument. I know very well that your Lordships' judgment must be independent of the circumstances of the particular case. But I hope that nothing which has been said will have left upon the minds of any of your Lordships any impression that there was any attempt upon the part of the Crown, or upon the part of those who unworthily represented the Crown, upon that occasion, to obtain for the purpose of this particular case any advantage whatever.

Sir Hugh Cairns.—Allow me to interpose, in order to disclaim putting it in such a way. I only said, attributing the best possible motives to everybody who had had to do with the making of those rules, we had a right to have them examined as the circumstances of the case threw light upon them.

Mr. Attorney General.—I made no complaint of what my learned friend had said. At the same time the matter had been referred to in a manner which made me anxious that your Lordships should understand how it had taken place.

Lord St. Leonards.—I understand that the orders were made upon the same day in November term.

Mr. Attorney General.—Yes, my Lord, and for that I am to this extent responsible, that I pointed out to their Lordships that a question might possibly arise, if the orders were made after the motion had been made, which might not arise, at all events in the same way, if they were made before.

Lord St. Leonards.—The orders were made for this very case.

Mr. Attorney General.—Beyond all doubt, my Lord; that is clear.

Lord Chancellor.—We quite understand. You were desirous of communicating to the House what the House in reality comprehended, that that suggestion of making the orders, and the pressure upon you to assent to this course, came from the Court.

Mr. Attorney General.—Just so, my Lord; but I do not wish to be understood as complaining of the Court in any way whatever.

Sir Hugh Cairns.—The only controversy between us would be this,—that, as I read the shorthand writer's notes, the first mention of the Queen's Remembrancer's Act, and the power to make orders under it, did not fall from the Court, but from the counsel for the Crown.

Lord Chancellor.—The learned Attorney General has stated that it was suggested by his junior that the rules made in 1860 would not be applicable.

The Attorney General.

Mr. Attorney General.—Yes, it was suggested by Mr. Jones to me; and the Court had intimated, in the first place, that the right of appeal had been given, either by the Acts of Parliament or by the rules made under them.

Lord St. Leonards.—It was quite clear that it had not been done by the rules made in 1860.

Mr. Attorney General.—No, my Lord; it had not, of course.

Now, my Lords, I will pass from that, and notice briefly the criticisms made by my learned friend, Sir Hugh Cairns, upon the orders themselves. I think them, I confess, very ineffectual criticisms. Of course there may or may not have been the power to make the orders; there may or may not be the power of applying those orders, if made, to the present proceeding; but I protest against the criticisms which say that, if there was the power, the orders are not properly and effectually made. My learned friend criticised the terms of the 3rd, 4th, 5th, 9th, and 11th rules; and, if I rightly understood him, he contended that they were ineptly and inefficiently made, even supposing there might have been the power to make such rules. He founded himself upon the word "adapt," which of course, as your Lordships will not have forgotten, exists in the 26th section, the section conferring the power, and which is in fact necessary there, because, as to certain forms, names of officers, and the like, adaptation is requisite if the provisions are to be applied to the Court of Exchequer.

Now, my Lords, the first clause which my learned friend observed upon was that which he noticed in the outset, the 3rd, in which the words occur, "the Court of Error, the Exchequer "Chamber, and the House of Lords shall be Courts of Appeal "for this purpose;" and my learned friend repeated the argument which he used in the Court of Exchequer Chamber, to the effect that in the Acts of Parliament, the Common Law Procedure Acts, the term "Court of Error" means the Queen's Bench, as the Court of Error from some particular inferior local Courts. Now, my Lords, there is not the slightest foundation whatever for any such an interpretation of the words. Of course, in a case where error lies to the Queen's Bench, then the words "Court of Error" will apply to the Court of Queen's Bench for that reason. But if you look at the principal clauses themselves of the Common Law Procedure Acts, where the term "Court of Error" is used, and from which we shall learn its meaning in these statutes, you will find that there is not the least pretence whatever for so limited or so special an application of it. The 155th to the 157th sections of the Act of 1852 are those which upon that point are material. I do not think that the words "Court of Error" occur in the 154th section. I am referring to the Act of 1852; and I call attention to clause 155 and the two following clauses. This expression, "the Court of Error," occurs in the

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Common Law Procedure Act, 1852, and the manner in which it is used there will, I apprehend, most clearly govern the interpretation of it as it is used in all these acts, unless indeed we find (which we do not find in any one of them) that the interpretation clause gives it a different sense.

Lord Chelmsford.—The term "Court of Error" is used in the Act of 1854.

Mr. Attorney General.—I know it, my Lord. I went to the Act of 1852 in the first instance. I spoke of the Act of 1852, and I was referring to section 154, owing to something which I overheard said at my side. Now section 155 of the Statute of 1852 introduces us to this expression; it says, "upon such suggestion of error" (which is that pointed out by the preceding section) "alleged and deemed being entered, the cause may may be "set down for argument in the Court of Error, in the manner "heretofore used, and the judgment roll shall, without any writ "or return, be brought by the Master into the Court of Error "in the Exchequer Chamber before the Justices," and so on; and a few lines down it goes on, "and the Court of Error shall "and may thereupon review the proceedings." And then section 156 provides that Courts of Error shall have power to quash proceedings. Section 157 says that Courts of Error shall in all cases have power to give such judgment and award such process, &c. The expression "the Court of Error" is a general expression used for the proper Court of Error; which will be the Exchequer Chamber in cases where no other Court of Error in the first instance is specially pointed out.

In the same Act of Parliament, clauses 228 and 233 relate to those particular local Courts which my learned friend Sir Hugh Cairns referred to. But, first of all, with respect to clause 228, I beg my learned friend's pardon about that. He assumed that the Queen's Bench was by this Act made a Court of Error for all the local Courts of Record to which Her Majesty might think fit, by the power given to her, at any future time to apply the provisions of this Act. But that is not so; there is not a word about the Queen's Bench being a Court of Error from those Courts.

Sir Hugh Cairns.—I said that by law the King's Bench is the Court of Error of the Inferior Courts of Record.

Mr. Attorney General.—Of course, my Lords, if it is the Court of Error in those cases, not by virtue of anything expressed in this Act, but because by law it is the Court of Error, which is my very argument, for that reason, and not because any technical sense is put upon the words by this Act of Parliament, error from those Courts would go to the Queen's Bench; and accordingly we find that in clause 233 it is provided, that "as to proceedings in error, the Court of Queen's "Bench shall STILL be the Court of Error from the said Court "of Common Pleas at Lancaster and Court of Pleas at Durham." The words "Court of Error" are *nomen generale* throughout the Act, signifying the proper Court of Error, whatever it may

be; which in some cases is the Court of Queen's Bench, but which in cases coming from the Court of Exchequer and the other Superior Courts at Westminster is the Court of Exchequer Chamber. And there is nothing whatever in the Act of 1854 to vary that construction; nor is there in the Queen's Remembrancer's Act; on the contrary, on the face of the Queen's Remembrancer's Act, the Court of Exchequer Chamber is distinctly referred to as the Court of Error from the Exchequer. As far as that goes,—whether the expression be superfluous when applied to the Court of Exchequer Chamber or not, I care not,—it does not vary the sense, nor introduce a reference to any other Court, when we are dealing with the Court of Exchequer.

With reference to the other clauses, the criticisms of my learned friend were, if possible, still more nugatory. The 4th rule is in these terms: "No appeal shall be allowed unless notice "thereof be given in writing to the opposite party, or his "attorney, and to the Queen's Remembrancer." That is exactly a case, and a proper case, of the necessary adaptation, because the language of the Common Law Procedure Act of 1852 is, "one of the Masters of the Court." There are, I believe, no Masters to discharge that office on the Revenue side of the Court of Exchequer; the Queen's Remembrancer is the corresponding officer. And the very word "adapted" is used, in order that such an adaptation as that should be made; and here it necessarily and properly is made.

Then we come to the 5th rule, upon which my learned friend made some observations which I hardly followed. The rule is this: "The appeal herein-before mentioned shall be upon a case "to be stated by the parties (and in case of difference to be "settled by a Court or a Judge of the Court appealed from)." My learned friend said, those words ought to have been altered for the purpose of adaptation, because they are the very words of the Common Law Procedure Act, and in the Common Law Procedure Act would be applicable to the Court, whatever it might be. But they are just as applicable to the Court of Exchequer, which is the Court appealed from, and of course a Judge of the Court appealed from is a Judge of the Court of Exchequer. It is perfectly plain, therefore, that there is nothing in that criticism.

Then, my Lords, I will take the 9th rule, upon which a very similar criticism was made, turning upon the words of the Act of Parliament. The words are: "Upon an award of a trial *de novo* "by one of the Superior Courts." Here you have the adaptation, in which of course the words are "the Court," because we are only dealing with this particular Court, therefore the words "the "Court," as applied to the Exchequer, are perfectly apt.

I need not dwell upon what my learned friend said about rule 11. The words are taken out of the Act of Parliament. "Upon motions founded upon affidavits it shall be lawful for "either party, with leave of the Court or a Judge, to mak- "affidavits in answer to the affidavits of the opposite party upon

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" any new matter arising out of such affidavits, subject to all " such rules as shall hereafter be made respecting such affidavits." The words mean substantially the same in the one case as in the other.

All these criticisms, my Lords, therefore fall to the ground, and I now come to the substance of the argument with respect to the power to make such rules being given to the Court of Exchequer. I will first take upon that head the general proposition which is advanced as to its being impossible to give an appeal by implication, and especially the reference made just now by my learned friend Mr. Mellish to the cases of the King v. Hanson and the Queen v. Stock, in the 4th Barnewall and Alderson, and the 8th Adolphus and Ellis. Those cases, when examined, will not be found to lay down any arbitrary or technical rule. They merely say this: You must find by the due construction of the words that the appeal is actually given, and not infer merely a probability that it may have been meant to be given. If you do not find words which are sufficient to work it out upon the face of the Act of Parliament, you must not infer it.

The case of the Queen v. Stock is as good an illustration for that purpose as it is possible to desire. What was that case? It appeared that by an Act of the 59th George 3rd power was given to certain commissioners, the Church Building Commissioners, to stop up certain footways going across churchyards, and reference was made for the form of notice to be given to an Act of Parliament of the 55th of George 3rd, which enabled Justices under other circumstances to do the like thing, and as to them gave an appeal to the Quarter Sessions. The Court said, we do not find, upon the construction of the words of the Act, that there is a general reference to the 55th George 3rd showing that what the Justices could do under that Act is to be done by the commissioners under this, with the same incidents and circumstances and consequences in all respects. We find a reference for a limited purpose, as to the form of notice; and, however rational it might have been to give that appeal from the commissioners, as the appeal had been given from the Justices, we do not find that it has actually been done. Of course if your Lordships, in working out this Act, should find that that line of reasoning is really applicable, it may be proper to adopt it. But if you do not find that, I apprehend that you will not come to the conclusion that any general principle is established by that or any similar case, which is applicable to the case now before you.

The case of the King v. Hanson, which my learned friend only read from the citation of it in the Queen v. Stock, is this [it is reported in the 4th Barnewall and Alderson, page 519]:—"The " defendant, on the 25th day of March 1820, was convicted in " the penalty of 50*l.* by two justices for the west riding of " Yorkshire, for having, within three months last past, (to wit,) " on the 22nd day of February 1820, at Elland in the west " riding sold beer and ale by retail, to be drank and consumed " in his house and premises, without first taking out an excise

" licence authorizing him to do so, contrary to the 48th George " 3rd, chapter 143, section 5. Against this conviction the defen- " dant appealed to the next sessions held at Pontefract, who " allowed the appeal, and quashed the conviction, no evidence " being offered in support of it, upon which the proceedings were, " removed into this Court by *certiorari*. The Solicitor General " on a former day obtained a rule *nisi*, calling on the defendant " to show cause why the order of sessions should not be quashed, " upon the ground that no appeal lay to the sessions from the " conviction in this case, and that therefore they had no juris- " diction to quash it."

It was upon that argument, with respect to there being no appeal given by the statute, that the observations of Lord Chief Justice Abbott were made. It appears that the matter arose thus:—The argument for the appellant was this:—The question arises under the 48th George 3rd, chapter 143, section 13, which provides, "That all and every the powers, directions, rules, " penalties, forfeitures, clauses, matters, and things which in " and by an Act made in the twelfth year of the reign of King " Charles the Second, intituled, an Act for taking away the " Court of Wards and Liveries, and tenures in capite and by " knights' service and purveyance, and for settling a revenue " upon His Majesty in lieu thereof, or by any other law now in " force relating to His Majesty's Revenue of Excise, are provided " and established for managing, raising, levying, collecting, " mitigating, or recovering, adjudging or ascertaining, the duties " thereby granted or any of them, (other than in such cases for " which other penalties or provisions are made and prescribed by " this Act,) shall be practised, used, and put in execution in " and for the managing, raising, levying, collecting, mitigating, " recovering, and paying the duties by this Act imposed, and " for preventing, detecting, and punishing frauds relating thereto, " as fully and effectually, to all intents and purposes, as if all " and every the powers, rules, directions, penalties, forfeitures, " clauses, matters, and things were particularly repeated and " re-enacted in this present Act."

Now by the 35th George 3rd, chapter 113, section 12, which was alleged to be an Act *in pari materia* to the 48th George 3rd, chapter 143, an appeal was given to the sessions. The Court dealt with the case in this way:—The clause of reference in the 48th George 3rd, chapter 143, only applies to such powers, &c. "as " in any of the laws relating to His Majesty's Revenue of Excise " are provided and established for managing, raising, levying, " collecting, mitigating, or recovering, adjudging, or ascertaining " the duties thereby granted." Upon the construction of the clause of reference, it appeared to apply to laws relating to that subject alone. Now the 35th George 3rd, chapter 113, imposed no duty, and was not an Excise law. It was not, therefore, one of the laws referred to. Its object was the regulation of police; and the provisions were quite distinct from those of the 48th George 3rd, chapter 143. It was upon that state of facts that the learned

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Judge said, "The rule of law is, that, although a *certiorari* lies "unless expressly taken away, yet an appeal does not lie unless "expressly given by statute. No Act of Parliament can be "produced giving an appeal in the present case. The order of "sessions is therefore wrong, and must be quashed." Upon the construction of the Act the Court found that the Acts referred to did not include that which was relied upon as giving an appeal in a different case. Therefore the question was reduced to this:—Does an appeal exist from the Justices where it is not given? And the Court only determined that an authority must be shown in some way or other in order to create the right of appeal. I think, therefore, that the general argument will not be found to relieve your Lordships in any way from the necessity of going into the particular argument upon the Act, and construing the Act before you, which is what we desire to be done.

I will take now, my Lords, the next branch of the argument; the argument from the other express provisions in the Queen's Remembrancer's Act, anterior to the 26th section. My Lords, I will just classify those provisions in this way. I will first of all make a few observations upon such of them as do not relate to the subject of error or appeal; then upon those which do, other than the 19th section; and, lastly, upon the 19th section. In the first place, I do not at all admit, and the learned Judges of the Court of Common Pleas who were in the minority in the Court below did not admit, for a moment, that you were to cut down the general power of applying the provisions of the Common Law Procedure Act, by inferring that nothing similar to that expressly applied in the particular antecedent provisions was within that power. My Lords, I cannot help thinking that the least attention to the provisions themselves which have been referred to shows, that nothing could be more arbitrary or unsafe than such a mode of construing the power in the 26th section. For there are three clauses which relate to matters which are not error or appeal; the 9th, 16th, and 17th. Take the 9th; the very first of those which are printed, "Section 222 of the Common Law Procedure Act, "1852, for the amendment of defects and errors in any pro-"ceeding in civil causes, and concerning the costs and terms of "such amendment, shall extend to all suits and proceedings "upon the Revenue side of the Court of Exchequer." The Legislature saw its way to the immediate and absolute adoption of that provision; but can anyone seriously contend that if the Legislature had not done that itself, the adoption of that provision concerning amendment would not have been within the scope of the power given by the 26th section to the Court itself?

Lord St. Leonards.—The argument is used in a different way, as I understood it; namely, that where the Legislature intended a thing they expresed it.

Mr. Attorney General.—That is precisely what I understood the argument to be, my Lord, and for that reason, inasmuch as

it is perfectly plain that the 26th section intends some more things to be done than what it has expressed.

Lord St. Leonards.—That is what they say.

Mr. Attorney General.—I am going to deal, my Lord, with what they say. The 26th section manifestly contains power to apply provisions of the Common Law Procedure Acts of 1852 and 1854 other than those which the Legislature has expressly applied. It will be found that those which the Legislature has expressly applied are in truth only those which are mentioned in the 9th section and those mentioned in the 10th and 16th sections. Those are the only provisions which it has expressly applied. But the express application of those does not for a moment warrant the inference, either that those provisions could not have been applied under the 26th section if the Act had been silent about them, or that, because those particular provisions are applied by the Act itself, therefore no others are meant to be applied under the powers contained in the 26th section.

Lord Chancellor.—The argument on the other side is, that it is so improbable, from what the Legislature have done, that they would have left this important provision without a direct importation of it into the Act, that you ought not to construe the word "practice" so as to include it.

Mr. Attorney General.—Yes, my Lord; I understand that to be the argument. I wish, in order to show how very baseless that argument is, that you should observe to what a very limited extent the Legislature has expressly adapted the provisions from the Common Law Procedure Act itself, and how much it has left at large. There are, in truth, only three of these clauses which are directly and distinctly adopted by the Legislature out of the Common Law Procedure Act.

Lord Chancellor.—Would you admit that argument itself as a principle of construction?

Mr. Attorney General.—No, my Lord; I do not by any means whatever. I think it would be a most dangerous principle, but most especially dangerous when attempted to be applied to an Act of the scope of that before your Lordships; when you find how very little has been done in the way of the direct application of any of the provisions of that Act by the Legislature itself, and how very large is the language of the power enabling the Court to apply those provisions. When we look at the little which has been done in the way of application of provisions of the other Act we find it is limited to these things; first, this power of amendment, which plainly would have been within the general power, but which the Legislature thought it expedient at once to adopt. I can only suggest one view of the section which would carry it beyond that which my learned friend admitted the Court of Exchequer might have done, and upon that view the bearing of that section would be, I think, favourable to my general argument. We may possibly suppose that that section, as to amendment, was introduced in order to cover the amendment of defects and errors in any stage of any proceedings in any suits upon the

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Revenue side of the Court of Exchequer, whether they were at *Nisi Prius*, or whether they were in the Court of Error, or anywhere else. If it was introduced for that purpose, it would then be an example of the desire to extend, under those words, "suits and "proceedings on the Revenue side of the Court of Exchequer," that salutary provision to every portion of the procedure in those suits, wheresoever it might occur. If it is more limited in its object than that, then I say it is still a thing which the Legislature has thought fit itself to do, but which, if it had not thought fit to do, might have been done under the 26th clause.

Then, my Lords, we come to the 16th section, which incorporates, as your Lordships will recollect, *per expressum*, all the powers, authorities, and provisions contained in the 46th, 47th, 48th, and 49th sections of the Common Law Procedure Act of 1854, extending them to all suits and proceedings upon the Revenue side of the Court of Exchequer. Those words also show, as do the words of the 9th section, that the Legislature had in view the suits and proceedings on the Revenue side of the Court of Exchequer, and not merely what might happen in the narrow sense of the word, when those suits and proceedings were absolutely *intra quatuor muros* of the Court itself. Those sections, from 46 to 49 inclusive, of the Act of 1854, when we look at them, will be found also to be matter, which I think my learned friend concedes might, if the Legislature had not done it itself, have been introduced as matter of practice or procedure under the power granted by the 26th section. They are these. Without reading the detail of them, their nature will appear from the marginal notes. The first is, "Power to Court or Judge to "direct oral examination of witnesses" "before the Court or "Judge or before the Master." Then the next directs the "pro-"ceedings before and upon such examination," including orders for the production of documents, to be mentioned in the rule or order, and which the witnesses are to bring. Then the next section refers to the examination orally of any person who refuses to make an affidavit. The 49th section is with respect to proceedings upon order for examination, and it regulates the way in which the depositions are to be returned. In fact these clauses relate to new methods of compelling the examination of witnesses, which were unknown before. The Court has thought fit to introduce them at once, together with some similar provisions from an earlier Act of the 1st William 4th. Can anyone say that the introduction of those provisions would tend to cut down and limit, as to other similar matters concerning evidence, witnesses, delivery, and the like, the general power which is given by the 26th section? I think not, my Lords.

Then comes the third matter, which is unconnected with appeal, namely, the dispensing with the commission for the trial of a revenue cause at the assizes. My learned friends have argued, and perhaps they may be right in their argument,—I am not at all concerned to insist upon that,—that although those words in the 17th section "the Justices of Assize are authorized to

" proceed thereon in like manner as they can or may do in " respect of causes pending upon the Plea side," were adopted directly from the earlier Act of the 2nd and 3rd of the Queen, yet their practical effect would be to carry with them down to the assizes, all the provisions of the Common Law Procedure Acts applicable to the modes of trial at *Nisi Prius*. That may be so. If it is so, it is not by express reference to the Common Law Procedure Acts, but by the general terms. My learned friend, Mr. Mellish, at all events, did not appear to think that that would prevent the Court from doing what in fact they have done, expressly adopting by their rules, under the 26th section, the provisions of the Common Law Procedure Act as to the mode of summoning juries, as to jury trials, and the like.

Then we come to the clauses relating to matters of error and appeal. The first only is one which corresponds with matter to be found in the Common Law Procedure Act; that is the 10th, which relates to special cases stated by mutual consent, and as to which I think it is sufficient to say that our argument at the outset seems to have received no answer. Our argument is, that it being a matter depending upon consent, the substitution of a special case for a special verdict was so obvious and simple an alteration, requiring so little need for the exercise of the discretion of the Court to make that alteration, that the Legislature saw their way to doing it at once.

Lord Wensleydale.—This requires the consent of a Judge, which the other clause does not; therefore it was necessary to introduce that.

Lord St. Leonards.—You say that Parliament was competent to do that simple thing, but could not carry it further.

Mr. Attorney General.—No, my Lord; I do not say anything of the kind. I do not say Parliament was not competent to do whatever it thought fit; but Parliament saw fit to entrust the Court of Exchequer with the power of dealing with other provisions which it did not itself deal with at the time. The only question is, how far it has given that power. With great deference, I never said anything about the competency of Parliament. I never said such a word, and it is not a mode of presenting my argument which I for a moment accept. But Parliament thought fit then to legislate upon this matter, because it did not appear to Parliament that it might involve any question of adaptation of particular provisions which it was expedient to remit to the Court of Exchequer. I do not think your Lordships will have any difficulty in coming to that conclusion. The clause involves, not only the consent of the Judge and the consent of the parties, but further——

Lord Wensleydale.—In the Act of 1854 it may be done without the consent of the Judge; that is not included in the Act of 1854; it may be done by the parties themselves, but then the Judge by this 10th section has to interpose his authority. I suppose it was necessary to introduce that.

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Mr. Attorney General.—Yes, my Lord; at all events there must be an order of the Judge.

Lord Wensleydale.—Not under the Act of 1852 or 1854.

Mr. Attorney General.—Yes, my Lord; I think it is so. I believe your Lordship is mistaken about that. I thought so; but I did not venture to trust my own recollection about it, because your Lordship is so seldom mistaken. But in the Act of 1852, section 46, which contains the early part of this 10th clause, is in these words——

Lord Chelmsford.—You referred to it before, I think.

Mr. Attorney General.—Yes, I did, my Lord. The words are, "The parties may, after writ issued, and before judgment, by "consent and order of a Judge, state any question or questions "of law in a special case for the opinion of the Court, without "any pleadings." And then the sequel of this clause is taken from the 32nd section of the Act of 1854. So that, I believe, there is not that difference; but the remark remains the same. There must be an order of the Judge; there must be the consent of the parties; and that being so, there appeared to be nothing which could require anything further to be done on the ground of those slight differences.

Lord Wensleydale.—It is altered in another respect. The words "unless the parties agree to the contrary" are introduced into the Queen's Remembrancer's Act.

Mr. Attorney General.—So they are in the 32nd section of the Act of 1854. I think your Lordship will find I was quite accurate in stating that it was compounded of those two clauses, and I do not think that there is any difference of substance between it and them. That is my impression. Then I say, my Lords, the fact that that has been done at once, in a case which could involve no consideration of possible difficulties arising out of the nature of a proceeding *in rem*, to which my learned friend Mr. Mellish has referred, or any other specialties of Revenue causes in the Court of Exchequer,—the fact that that has been done at once in a matter as to which the Legislature saw their way to legislating at once, and did not prefer to remit it to the Court, as to whether any consideration at all or any adaptation was requisite,—I say that fact seems to me to furnish no argument as to the things dealt with by the other clauses. For there is this difference with respect to the other clauses, without exception, both those as to error and those as to appeal,—the clauses as to appeal are sections 12 to 14, and those as to error are sections 15 and 20, section 20 relating to bill of exceptions, which of course involves error. Those were all matters which were not provided for directly or indirectly by the Common Law Procedure Act, and none of which, therefore, could be involved in or covered by the general power of applying the provisions of the Common Law Procedure Act given by section 26. I think, therefore, that, under those circumstances, instead of finding in those provisions reasons for drawing an adverse conclusion as to the extent of the power meant to be given by clause 26, I should

draw the opposite conclusion, that the Legislature provides, with regard to particular branches of the special jurisdiction upon the Revenue side of the Court of Exchequer which are incapable of having the Common Law Procedure Act applied to them at all, special modes both of appeal and of proceeding by error, showing that both the procedure by appeal and the procedure by error are meant to be applied to that branch of the Court; and it expressly gives a bill of exceptions, which by the previous constitution of the Court was not considered to lie to any misdirection or other matter of law arising at the trial.

I say, my Lords, that these are provisions, which, for the purpose of laying the foundation for the uniformity of practice contemplated and aimed at by the 26th section, were necessary, and which no power either of making general orders of the Court, or of extending and applying the provisions of the Common Law Procedure Act, would have reached. We have, therefore, upon those points of error, nothing in *pari materia* with the objects of the power given by the 26th section, excepting only that special case under the 10th section, which, resting entirely upon consent, is obviously to be referred to a very intelligible reason.

Now, my Lords, we come to the 19th section, and it appears to me, I must say, that the arguments which arise out of that are of immense weight in favour of the Crown, unless I entirely deceive myself as to the bearing and force of that 19th section. Now, that 19th section, your Lordships will recollect, does not adopt the clauses or the provisions in the Common Law Procedure Act applicable to writ of error, for your Lordships will observe there is a remarkable difference between the way in which the 19th section operates and the way in which the 9th and 16th sections refer to particular clauses by their numbers in the Common Law Procedure Act. There is no reference in this 19th section to any clause by number or otherwise in the Common Law Procedure Acts. But to a certain extent the same thing is done in substance with regard to the Revenue side of the Court, which had been done by the Common Law Procedure Act with regard to the Plea side of the Court of Exchequer as to error; stopping at that point, and then devolving a discretionary power upon the Court itself, and upon the judges of the Court, to work out the consequences of that change.

Now, my Lords, let us see how that stands; and the more, I think, we dwell upon it, the more important will be its influence upon the general construction and effect of the 26th section. I will first of all advert to an argument of my learned friend, Sir Hugh Cairns, with regard to these words, "shall be "taken in manner and subject as to such terms and conditions "as to giving bail or security as may be directed by any rule "or order made by the barons under this or any other Act or "Acts of Parliament authorizing the same." My learned friend always stopped, I observed, at the word "order," and I did not wonder, because the words which follow appear to me to be

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more useful to me than to him. My learned friend observed, that he thought he had put me upon a dilemma as to that. Either the dispensation as to the Attorney-General with the conditions as to bail or security contained in the Common Law Procedure Act, which the barons were empowered to make by the power here given to them, was necessary, according to my construction of the 26th section, or it was not. If it was not necessary, then he said, "You have the Legislature expressly "dealing with the subject of error, and not leaving it to be "operated upon under the 26th section." But if it was necessary, then he suggested another difficulty; he said, "It may be "that the terms and conditions as to giving bail or security, "which we find in the Common Law Procedure Act of 1852, "section 151, are indispensable conditions of the procedure in "error pointed out by that Act." In order to see how far that is so, perhaps it may be convenient to refer to them.

Your Lordships recollect the clauses as to error in the Act of 1852. They begin at clause 148, which says, that the proceeding to error shall be a step in the cause, and that a writ of error shall not be necessary. Clause 149 says, the party alleging error to deliver a memorandum. Clause 150 says, "Proceedings in "error shall be deemed a *supersedeas* of execution from the "time of the service of the copy of such note, together with the "statement of the grounds of error intended to be argued until "default in putting in bail or an affirmance of the judgment, or "discontinuance of the proceedings in error, or until the pro-"ceedings in error shall be otherwise disposed of, without a "reversal of the judgment," and so on. The 151st section says, "Upon any judgment hereafter to be given in any of the said "Superior Courts of Common Law in any action, execution "shall not be stayed or delayed by proceedings in error or "*supersedeas* thereupon without the special order of the Court "or a judge, unless the person in whose names such proceedings "in error be brought, with two, or by leave of the Court or a "judge, more than two, sufficient sureties, such as the Court "wherein such judgment is or shall be given or a judge shall "allow of, shall, within four clear days after lodging the memo-"randum alleging error, or after the signing of the judgment, "whichever shall last happen, or before execution executed, be "bound under the party for whom any such judgment is or "shall be given, by recognizance to be acknowledged in the "same Court, in double the sum adjudged to be recovered by the "said judgment."

That clause, therefore, appears to make the giving of such recognizance with sureties a condition *sine qua non*, not of the error, but of the stay of execution. And it is apparent, I think, that it would not have been possible under the 26th section, if that stood alone, and if the 19th had not been found in this Act, by the mere extension, application, or adaptation of the provisions of the Common Law Procedure Act, with a view to uniformity, to have caused a stay of execution to take place

without the *sine qua non* condition upon which that statute had given it. It was for that reason, as was pointed out by Mr. Justice Willes, that the Legislature did not think fit itself to adapt, but left the Court of Exchequer to adapt, and did not think fit itself to extend and apply, all those provisions of the Common Law Procedure Act as to error, to proceedings in error upon the Revenue side of the Court of Exchequer; but it gave the Barons of the Exchequer power to determine in what manner those proceedings should be taken, and subject to what terms and conditions as to giving bail and security. And there is very good reason, why the Legislature should have dealt in that way with that portion of the case.

If that be so, says my learned friend, the Court of Exchequer has now done wrong; because, by the last of their rules they have said, "Notice of appeal shall be a stay of execution, pro- "vided that within eight days after the decision complained "of, or before execution delivered to the sheriff, bail, to pay "the sum recovered and costs, or to pay costs when adjudged, "be given in like manner and to the same amount as bail in "error is required to be given under the rules of this Court, "made on the 22d day of June 1860, or as near thereto as may "be applicable; provided that such bail shall not be necessary "to stay execution in cases where the Appellant is the "Crown, the Attorney General on behalf of the Crown, or "the Prince of Wales, or the Duke of Cornwall for the time "being;" which would all be cases upon the Revenue side. My learned friend says, if the 26th section, *per se*, would not have been duly pursued by omitting the conditions for the stay of execution, how came the Court to make that order? Now, the answer to that argument is extremely plain. Under the power given by the 19th section, the Court of Exchequer had made rules upon that subject, which are the 97th and 98th rules of 1860; the effect of which is this, that proceedings in error should be generally a *supersedeas* of execution from the time of the service of the copy of the note alleging error, until default in putting in bail; and then, that bail should be given in a certain way, when error was brought by a defendant against whom the Crown had recovered judgment; but not when error was brought by the Crown, or by those partaking of the Crown's prerogative. The Court of Exchequer had exercised the powers given to them by the 19th section with regard to proceedings in error, by dispensing with the recognizance and security in the case of the Crown, where the appeal was brought by the Crown; but requiring it when the appeal was brought by a subject; and for very intelligible reasons.

Now, my Lords, that having been done, the next question is, what was the proper way of extending, applying, or adapting the provisions of the Common Law Procedure Act of 1854 as to appeal, if they had power to do so, under the 26th section; having regard to what had already been done in respect to bail in error under the 19th section. If you will look at the

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38th clause of the Act of 1854, you will find that it is in these words, "Notice of appeal shall be a stay of execution, provided " bail to pay the sum recovered and costs, or to pay costs where " the appellant was plaintiff below, be given in like manner and " to the same amount as bail in error, within eight days after " the decision complained of, or before execution delivered to the " sheriff." The direction, therefore, of the Legislature is, that the bail in appeal shall correspond with the bail in error. And the Queen's Remembrancer's Act, by the 19th section, having given a special power to the Barons to regulate specially the subject of bail in error, which power they have exercised, of course when under the 26th section, supposing them to have the power, they came to adapt the provisions as to appeal to the Revenue side of the Exchequer, they could only do it by adapting the bail on appeal to the bail in error, as constituted by the power given under the 19th section. And that is what they did. Therefore, as far as that goes, the argument amounts to nothing whatever, either against the power or against what the Court has done.

Now, my Lords, I wish that the relative bearing of these 19th and 26th sections upon each other should be carefully considered, because it appears to me to be a matter of extreme importance to the general argument. What has the Legislature done by that 19th section with regard to error? It has simply provided for that subject to this extent, that a writ of error shall not be necessary upon the Revenue side, and that the proceeding to error shall be a step in the cause. Having said that and no more, it goes on to say, that that proceeding shall be taken "in " manner and subject to such terms and conditions as to giving " bail or security as may be directed by any rule or order made " by the Barons under this or any other Act or Acts of Par- " liament authorizing the same." What is meant by "under " this Act of Parliament"? Why it is under the 26th section. It remits you to the 26th section as the section under which rules and orders shall be made to determine the manner in which the terms and conditions as to giving security shall be regulated, and under which the bail shall be given. The Legislature relies upon the 26th section, upon one or both of the branches of it, as giving this power to the Barons. And for what purpose is that power given? To work out the proceeding in error. Without something being done which has to be done by the Barons, the whole matter is left at its first stage. Nothing is done; because the Act only says that there is to be no writ of error, and the proceeding to error shall be a step in the cause. But the whole mode of proceeding to error, and everything to follow to make that mode effectual, is left to the Barons to work out under the powers given to them to make orders by the 26th section, or under any other power that they may have *aliunde*. What ground is covered by that? The whole ground which is also covered in the case of appeal; so that the argument is this. It is not conceivable that power was intended to be given to the Barons to do,

with regard to appeal, that which the 19th section expressly remits to them to do under the 26th section as to error, and which they have done. I did not hear either of my learned friends put a construction upon the 19th section, the effect of which would be——

Sir Hugh Cairns.—Those rules made in 1860 might have been good or bad; but if they were bad, they could not make the present rules good. I did not pursue this subject, however, because I thought it was your Lordships' wish that I should not do so.

Mr. Attorney General.—I quite agree that if they were bad they could not make the present rules good. But my learned friend, Mr. Mellish, in his argument, expressly and distinctly admitted, as far as he was concerned, that they had power to adapt for this purpose the clauses in the Common Law Procedure Act of 1852, which follow the one saying that proceeding to error is to be a step in the cause. That is what they have done. I need not ask your Lordships to go into any question depending upon what they have done. I argue that they necessarily had power to do it; and that upon the construction of the 19th section alone it must have been intended to be competent for them to do what in effect they have done. For, otherwise, the whole matter is mutilated, and you put an end to the existing proceeding in error, and substitute nothing for it.

Lord St. Leonards.—I do not understand you with respect to your construction. The Act of Parliament has clearly given to the Court of Exchequer the power of adding rules as to error, according to the words of an enactment, which is a copy of the Act of 1852 in so many words. Where is the difficulty as regards that Act? Does your argument go to this extent, that because the Court had that power relating to the substitution of a step in the cause for a writ of error, therefore they could issue orders as to appeals?

Mr. Attorney General.—My argument goes to this, that when we see what the Legislature has left them to do as to error, it can no longer, with the least plausibility, be alleged that it was improbable that the Legislature should leave them to do as to appeals what I say it has done by the 26th section.

Lord St. Leonards.—That is done expressly in so many words as to error.

Mr. Attorney General.—Let us see what is done. The Legislature say that "a writ of error shall not be necessary,"—that is practice, "and proceeding to error shall be a step in the "cause,"—that is practice. Then it is said, "and shall be taken "in manner and subject as to such terms and conditions as to "giving bail or security as may be directed by any rule or order "made by the barons" under this Act. Then we have the 26th section, which empowers them to make rules or orders under the Act.

Lord St. Leonards.—Nobody doubts that.

Mr. Attorney General.—If your Lordships will pardon my

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saying so,—I take it that these things, which nobody can doubt, may be of very great use in throwing light upon what may be controverted; and therefore I comment upon this, as showing clearly that the Legislature has given a perfectly analogous power to the barons, with regard to error, to that which is given with regard to appeal, if we are right, by the 26th section. It has left them to regulate that subject of error under the very same power which is given by the 26th clause. What I wish your Lordships to see is this: A great portion of the argument upon the other side assumes that any regulations concerning error are regulations which it cannot be supposed that the Legislature meant to entrust to the Barons of the Exchequer to make. The regulations concerning error here stop at a point short of mentioning what is to be the Court of Error, and how the proceeding in error is to be introduced into that Court. All that is left to be filled up, both as to the way in which the proceeding in error is to be brought into the Court of Error, and as to the way in which the record, when brought in, is to be operated upon by the Court of Error.

Lord St. Leonards.—That would be very easily executed.

Mr. Attorney General.—Yes, my Lord, therefore these are provisions very strongly showing the confidence the Legislature reposed in the Barons of the Exchequer.

Lord St. Leonards.—But not extending to something which is not actually mentioned.

Mr. Attorney General.—I do not at all argue, my Lord, from the 19th clause standing alone that that would extend to anything which is not mentioned, but I say that the language of the 26th section is sufficient to cover it, and that, as to appeals, that section enables them to do the very same thing which they were enabled to do by the 19th section as to error. For this very obvious reason, because the Legislature saw that adaptation, and even adaptation making a difference in substance might be necessary as to proceeding in error, in order to enable it to be applied to the Revenue side.

Now, my Lords, the rules that were made I will refer to by way of illustration, as showing what, if I rightly construe, (and I think your Lordships will construe it in the same way,) the power in the 19th section, it was necessary and proper to do under that power. Now the 101st rule is this, "The several "provisions contained in the 154th, 155th, 156th, and 157th "sections of the Common Law Procedure Act of 1852, where "applicable, shall extend and be applied and adapted to the "Revenue side of the Court of Exchequer." That includes the provisions as to what is to be done both in bringing a case into the Court of Error and also when the case is there. And later, in the same orders of 1860, at pages 36, 37, 38, and 39 of the book which I put into your Lordships' hands, we find the forms issued by the Court under that power which contain, amongst other things, the form of judgment of affirmants, where judgment given for the Crown to be entered upon the original

judgment roll. That is at the bottom of page 36. The form of judgment of reversal, where judgment originally given for the Crown, is at page 37. It is all on the judgment roll of the Court of Exchequer; and then the forms of notice of error in law and suggestion in error are at pages 38 and 39. Those are the orders made in execution of that power with regard to error. I submit that they are duly and regularly made, and if duly and regularly made, then covering just as much ground with regard to proceeding in the Exchequer Chamber, and even, apparently, in this House, as is covered by the orders with regard to appeal which are now in question.

My Lords, at this part of the argument I will make some observations upon what my learned friend, Sir Hugh Cairns, said with regard to the *regulæ generales*, referred to by Mr. Justice Williams. My learned friend, Sir Hugh Cairns, following up the remarks of Mr. Justice Williams upon that subject, which, by the way, did not at all mean (the learned Judge was very much too well informed to mean) that those *regulæ generales* were made by the inherent authority of the judges;—Sir Hugh Cairns referred your Lordships to four Acts of Parliament, three as to pleading, and one as to practice, under which those general rules have been made; and he pointed out clauses in those Acts, which said, that the rules to be made by the judges, under those Acts, should be binding upon the Courts of Error into which the proceedings might be carried by writ of error; and other expressions were used to the same effect in all of them.

Now, I think that the very fact that the Legislature had, by its earlier Acts, all passed before this Queen's Remembrancer's Act was passed, entrusted the judges with the power to make general rules for the regulation of their own pleadings and practice, to extend to matters of error, and which were to be recognized by Courts of Error, does, as Mr. Justice Williams thought, furnish a very solid and substantial argument against the notion that it was improbable that the Legislature, by the 26th clause of this Act, could intend to confer the simple power to extend and apply such of the provisions of the Common Law Procedure Acts as related to the same subject, or to a subject *in pari materiâ* with that. Former legislation had given such a power; and it had been seen with regard to that former legislation that it was not desirable that that power should be checked by the suggestion that Courts of Error were concerned in the matter, and that they ought to be bound by that which was done. Parliament had said they should be bound—and that was the system of legislation down to that time in similar matters.

Lord Chancellor.—A good deal of this is on the fringe of the case, is it not?

Mr. Attorney General.—I quite agree with your Lordship that it is.

Lord Chancellor.—Probability or improbability, unless it be sufficient to influence the construction, is matter that we need

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not enter into. The two cardinal points in the case are, the extent and meaning of the word practice in the 26th clause, and the question with regard to the retrospective operation of the rules?

Mr. Attorney General.—I am very glad to hear your Lordship say so, because if you look at the judgments of the four learned judges, who are adverse to the Crown in this case upon the point now under discussion, I think it will be found, in every one of those judgments, that the greatest possible stress is laid upon the notion of an *à priori* antecedent improbability, that such a power could be conferred; and they approached, I think, the handling of the particular language of the clause under the influence of that presumption, and construed it under that influence in a very different way from that in which they would have construed it if that had not been in their minds.

My Lords, I do not know whether it would be expedient for me to pass entirely over all the rest of the argument upon the fringe of the case which my learned friend raised, but I will endeavour to deal shortly with those points which I have noticed, because I have too much respect for everything which my learned friend says, not to feel that his arguments deserve some reply. He used some *à priori* arguments before he came to the direct interpretation of this 26th section. I will notice them as shortly as possible. He first of all said that between the appeal from the order on the new trial and error upon the bill of exceptions, there were three differences to which he attributed importance. The first was, that if you come by way of motion for a new trial, you pass through the court of first instance, the Court of Exchequer itself, as well as through the two subsequent courts. Therefore a third court, he says, is added; that is one difference. And, secondly, that for the purpose of a bill of exceptions, a point must be taken at the trial, which need not have been done if you moved the Court for a new trial. Thirdly, that non-direction was left open upon a motion for a new trial, as it would not have been upon a bill of exceptions. I take the liberty of saying, with regard to the two first of those differences, that they manifestly relate to matters of procedure only; they are circumstances affecting a particular mode of raising the question of law for the determination in the Court above, and not matters of substance at all affecting intrinsically the right of the party. I say, secondly, that the Legislature having found that the one mode of procedure is an improvement, and an amendment of the law, and that it tends to its simplification in all ordinary causes, it certainly is not to be inferred that in this class of cases it would have a different effect. With regard to non-direction, I take the liberty of reminding your Lordships that by the clause in the Common Law Procedure Act of 1854, which is applied in the present rule, namely, the 35th clause, the power of taking an appeal is expressly limited to cases of motions for a new trial, upon the ground that the Judge has not ruled according to law.

Lord Cranworth.—I observe that your rule only goes to that.

Mr. Attorney General.—Yes, my Lord, the rule only goes to that, and it is so plain that that is a matter which might be raised by a bill of exceptions, that I shall not dwell further upon that point.

Then my learned friend, Sir Hugh Cairns, suggested some *à priori* reasons why, although those changes might be improvements in other cases, they might not be so upon the Revenue side of the Court of Exchequer. And, first of all, he said, that the great object was that the Revenue should be collected expeditiously; and secondly, that the Crown would only appeal for a principle, which would be best raised by a bill of exceptions; and thirdly, that a multiplicity of appeals would be injurious to the subject by reason of the Crown having the longer purse; and fourthly, that the Court of Exchequer in Revenue cases may be presumed to have a peculiar knowledge, so that their judgment should be final.

Now, my Lords, I may remark that a good many of those reasons seem to assume that, as a matter of course, the judgment would be always, or generally, against the Crown in Revenue cases; because if the judgment were, as it more often is, against the subject and for the Crown, it is obvious that the subject's interest would be to raise the question of law in the most convenient form, just as in any private case. Therefore arguments of that kind are clearly counter to the general principle of the improvements introduced by the Common Law Procedure Acts. As to the peculiar knowledge of the Court of Exchequer, that may be a very good reason why the Court of Exchequer should be intrusted with the power of making these rules and orders to adapt the provisions of the Common Law Procedure Acts, which are capable of being adapted. But it is no reason whatever, that I can see, why its decision should be final either against the subject or against the Crown, on a matter of law, or in one form rather than in another.

Now, my Lords, I come to the 26th section itself. Of course I quite agree that the question entirely depends in the result upon that. Upon the 26th section two points were insisted upon, of subordinate importance, with reference to the construction, but which ought not to be passed over without comment. First of all, your Lordships were called upon to observe that the orders were to be made by the Lord Chief Baron and two or more Barons of the Court of Exchequer. And, secondly, that the words "from time to time" occurred in each branch of the clause. Now, as to the Lord Chief Baron and two or more Barons of the Court of Exchequer being authorized to make those rules and orders, it is a plain matter of fact that a large and important power is given to them.

I do not read the 27th section as one of your Lordships at one moment appeared to do, as giving the power of issuing new and altered writs and modes of proceedings and scales of costs to any other body than those who have the power under the 26th sec-

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tion. It is, "as the said Lord Chief Baron and Barons shall "from time to time think fit to order." But I apprehend that this power might be exercised in the same manner as the power under the 26th section. It is clear that what is to be done under the 19th section, as well as what is to be done with respect to adaptation and application, is, in every one of the particulars mentioned, to be done by rules which the Lord Chief and two other Barons may make. And as the Legislature has placed confidence in them as a sufficient *quorum* of the Court, I apprehend that the words in the 27th section cannot possibly furnish an argument, one way or the other, against the construction for which we contend.

Now, with respect to the words "from time to time," your Lordships will observe that those words occur thus, "from time "to time to make all such rules and orders as to the process, "practice, and mode of pleading," &c., "and also from time to "time by any such rule or order to extend, apply, or adapt "any of the provisions." There is no express power granted of revocation either with respect to the one or the other; but with regard to rules or orders as to the ordinary practice of the Court, that being an inherent power, it was not necessary to say that there should be a power of revocation. With regard to the power to extend, apply, or adapt the provisions of the Act of Parliament, the power to extend or apply is not a power to revoke, and you could not possibly imply such a power, merely from the fact that the Court was not compelled *uno flatu* to perform the whole operation, but might extend and apply one portion at one time and another at another time.

Lord Chancellor.—The extension and application are to be made by rules, and those rules may fall under the same category with respect to revocation as ordinary rules, may they not?

Mr. Attorney General.—I think not, my Lord; ordinary rules are revocable, simply because they are *in gremio* of the Court to make or unmake; you have an antecedent power to which you can refer it. But when Parliament expressly gives power to extend, apply, or adapt any provisions of Acts of Parliament, I submit, and my learned friend appeared to agree with the view I take, that this being a thing once done, it operates by virtue of the Parliamentary enactment, which only required a condition subsequent to take place, namely, a certain action on the part of the Court, to make it apply to a particular subject. There is that distinction in the subject matter between the two cases.

Now, my Lords, what is the relation of the two clauses of section 26 to each other? Your Lordships several times pressed my learned friends to state their views upon that point, and I have been struck and edified by the not entirely accordant answers which have been given to those questions. I take, first, their last answers, which have received the benefit of the after-thought and over-night consideration of my learned friend, Mr. Mellish. He has suggested that those two branches of the

clause may be accounted for by bearing in mind the difference between a proceeding *in personam* and a proceeding *in rem* in the Court of Exchequer. My answer to that, my Lords, is that I do not find in the two branches of the clause any such distinction drawn. If that had been the object of the clause, it will be very manifest that it would have been enough for the Legislature to express its object and purpose, and to limit the power in the way which that argument supposes. But the words are perfectly general in each branch of the clause, "To make all such rules and orders as to the process, practice, "and mode of pleading on the Revenue side of the Court;" and again, "to extend, apply, or adapt any of the provisions "of the Common Law Procedure Act, 1852, and the Com- "mon Law Procedure Act, 1854, and any of the rules of "pleading and practice on the Plea side of the said Court to "the Revenue side of the said Court." It is quite plain that upon the face of the clause there is no such distinction; that whatever is capable of being done with regard to one class of causes upon the Revenue side of the Court, under either branch, is made by the language of either branch equally capable of being done as to the causes of the other side. I think that the argument recoils upon my learned friend, for did not he tell your Lordships that as to the other class of proceedings upon the Revenue side of the Court, which are proceedings *in personam* rather than *in rem*, there could be *a priori* no reason whatever why the general mass of the provisions of the Common Law Procedure Acts should not be applied to make a substantial uniformity as far as was possible. What is the result, then, of his argument? That you are not to have that uniformity as to proceedings *in personam* upon the Revenue side of the Court of Exchequer, so far as relates to those proceedings connected with the subject of appeal. I think that does not much assist him. But as to the distinction, I do not trace the distinction upon which he relies as the foundation for the two branches of the clause at all; upon the face of the clause, the first branch is as distinctly applicable to proceedings *in personam* as to proceedings *in rem*. The last branch is as applicable to proceedings *in rem* as to proceedings *in personam*, having regard to the words of the clause, provided always that the provisions are capable of being so applied.

So much for the answer of my learned friend, Mr. Mellish. What was my learned friend, Sir Hugh Cairns' answer? His answer was this: And here, again, I find my learned friends in some degree of conflict with each other. Sir Hugh Cairns said, in the first place, with respect to the second branch of the clause, which you observe is introduced by emphatic words, and words which plainly show that an additional thing and a different thing is meant, that it was thought well to express the opinion of the Legislature in favour of uniformity. My answer to that is, that if that had been all, it would have been just as easy to say something about uniformity at the end of the first

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branch of the clause; but what is said about the uniformity, is said at the end of the second branch of the clause, and all the words about the Common Law Procedure Act would have been unnecessary for that purpose. His second reason was, that the second branch of the clause enabled the Barons to apply the provisions of the Common Law Procedure Acts *in cumulo*. Your Lordships observe, upon that, that if there had been no more than that to be done, could not they have done that upon the first branch of the clause? Of course they could, if it was limited to the same matters.

Then my learned friend said, adopting my argument, that this power to extend, adapt, and apply any of the provisions of the Common Law Procedure Acts would be different in its operation, because it would be a revocable power, and would bring the matters upon which it operated under the enactments themselves, by virtue of the enactments so applied. There I agree with my learned friend; but surely that at once introduces considerations which remove out of our way, under that branch of the clause, all the difficulties which might otherwise exist with regard to any of the provisions of the Common Law Procedure Acts, which may go beyond that which it would have *à priori* in the power of the Court of Exchequer to do for the regulation of its own procedure and its own practice. What is the inference from the very fact, that besides authorizing it in the largest terms to regulate by order its own procedure and practice, the Legislature thought it necessary to go beyond that, and, with a view to produce the greatest possible uniformity, to authorize the extension and application of any, without exception, of the provisions of the Common Law Procedure Acts? On the very face of such provision it is, I think, apparent that it must have been intended to enable the Court to adopt provisions which, by its own intrinsic power, it could not have adopted, and which go beyond those matters which were *in gremio* of the Court itself, but with which it was necessary to deal for the purpose of producing the desired result of uniformity. Accordingly, that seems to us to be the plain and natural constructions of the words.

My learned friend further said, that he could conceive of matters which, in that view of the case, might be done under the latter and not under the former branch of the clause. And referring to particular enactments in the Act of 1854, he pointed out the provisions in the Act as to injunctions, inspection, attachment of debts, specific performance, specific delivery, and equitable defences. My learned friend, Mr. Mellish, appeared to think that, as to injunctions, they could not possibly be applied, forgetting, as it appeared to me, in that part of his remarks, that when the rules as to injunctions are to be applied, it does not mean that an injunction is to be given in every case, but only in those cases in which, having regard to the analogous practice of the Courts of Equity, injunctions might properly be given. But if all those things which, in substance, conferred

new jurisdiction upon the Court of Exchequer, are capable of being applied under this last branch, that shows that it was intended to go far beyond what that Court, under its own jurisdiction, could have done. The enlargement of jurisdiction is not a thing foreign to this part of the Act. And if your Lordships were to look through the Act of 1854, as probably you will think it right to do, before disposing of this case, you will find great difficulty in discovering any portions of that Act which have not already been expressly applied to the Revenue side of the Court by the Queen's Remembrancer's Act, which are more fit to be applied for the purpose of uniformity, that being the purpose pointed at, than this very portion which relates to the mode of appeal, by way of substitution, for a bill of exceptions upon a motion for a new trial.

Now, my Lords, I ventured both here and in the Court below to put this test. I said, supposing these very same words had been used in a positive enactment; if it had been said, for instance, that those clauses of the Act of 1854, taking them by their numbers, which have been applied and adapted by the Court of Exchequer, shall be extended and applied to the Revenue side of the Court of Exchequer, would there have been the slightest difficulty in the interpretation of those words as a mere question of construction? It is important to inquire whether there have been the slightest difficulty in the interpretation of those words in that case, because, if those words would have had a very clear and plain interpretation occurring in an enactment, why are they not to have the same interpretation occurring in a parliamentary power given by an enactment? If the Legislature had said,—All the provisions of the Common Law Procedure Act, from section 34 to section 45 inclusive, shall be extended and applied to the Revenue side of the Court of Exchequer for the purpose of making the process, practice, and mode of pleading upon the Revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side, can there be the slightest doubt that they would have been found to be perfectly applicable, and that their application would have been that for which we contend? But my learned friend says, in so reasoning and putting that question, you get rid of all the collateral arguments which are adduced against such a construction of the power—of course you do—you get rid of the collateral arguments; but upon the words themselves, as it appears to me, if the words themselves would have been perfectly sensible and susceptible of a perfectly easy construction, with regard to their subject matter, if they had occurred in a positive enactment, why are those very same words to receive a different sense when they occur in the parliamentary power? I think no reasou whatever can be given.

Now, my Lords, I come to the argument which turns upon those words, "the Revenue side of the Court." My learned friend, Mr. Mellish, said, that in truth there were two expressions

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to be construed, the one "the Revenue side of the Court," and the other, "process, practice, and mode of pleading." What is the meaning which is to be collected from the Act itself of those words, "the Revenue side of the Court." I say, that they apply to suits and proceedings on the Revenue side of the Court of Exchequer; that is the natural signification of the words. It is the general summary of all the business that is done there, in the course of the suits and proceedings commencing there and terminating there, and the record of which is throughout the record of that Court.

Upon looking to the other clauses in this Act which will illustrate that subject, I think we find that that view of the meaning of those words is confirmed. Look at the 9th section. "Section 222 of the Common Law Procedure Act, 1852," "shall "extend to all suits and proceedings on the Revenue side of the "Court of Exchequer." The 10th section says, "In any suit or "proceeding on the Revenue side of the Court of Exchequer." Then by the 17th section Judges of Assize may try suits and proceedings "pending upon the Revenue side of the Court of Exchequer." The 16th section says, that the other sections which have been mentioned before "are hereby extended to all "suits and proceedings on the Revenue side of the Court of "Exchequer." The 19th section says, "A Writ of Error shall "not be necessary or used in any suit or proceeding in error on "the Revenue side of the Court of Exchequer." The 18th section says, "No judgment in any cause on the Revenue side of "the Exchequer." Section 21st says, "The costs of all suits and "informations and other proceedings, and of any interlocutory "matter or proceeding on the Revenue side of the Court of "Exchequer." Throughout the Act, in every other portion except this 26th section, we find the longer and more general form of expression is adopted:—"suits and proceedings on the "Revenue side of the Court." Do you think that by the shorter form of expression, "to the Revenue side of the Court," anything different is meant from that which is in the longer form expressed throughout, namely, "suits and proceedings upon the Revenue "side of the Court." I apprehend that the reasonable construction is, that the whole of those suits and proceedings are throughout intended; and that this power is, for the benefit of the suitors, to adapt to all that shall take place in those suits and proceedings on the Revenue side of the Court the same rules of practice which apply to other cases.

Now, my Lords, I will deal with the meaning of the other word "practice." With regard to process, I think it is very unimportant whether we take the narrower or the larger sense, though I confess I am unable to see why the larger sense in which it is used by Lord Coke, and which signifies the whole procedure in the cause, should not be adopted.

Lord Chancellor.—That would render unnecessary the words, "the practice and mode of pleading."

Mr. Attorney General.—No, my Lord, because the process in that case is the process in every particular cause; but the words practice and mode of pleading are larger terms, which embrace the rules of the Court. I think that is a sound distinction. But take "process" or "practice," whichever is the larger, and it is clear that one must be large enough to cover this; or take all the aggregate of the words together, as intended to cover all that fairly comes within those expressions, and they must cover it. My learned friend has said, that the preamble of the first Common Law Procedure Act, the Act of 1852, does not warrant the inferences which some of the Learned Judges of the Court of Common Pleas have drawn from it, because, he said, that it does not at all follow that that which is introduced by the preamble, relating to process, practice, and pleading, should extend to nothing but what the Legislature intends to comprehend under the meaning of those words. But I beg your Lordships attention to this, that it is perfectly clear upon the preamble, that either the words themselves are used to cover and include all the subjects thereafter *seriatim* dealt with, or, which is for my purpose just as useful, that the mode of dealing with all the subjects afterwards mentioned is necessary for the recited purpose and object, namely, "for rendering more simple and "speedy the process, practice, and mode of pleading in the "Superior Courts of Common Law at Westminster."

I care not upon the construction of the 26th section, whether you describe a particular subject as being strictly a matter of process, practice, or mode of pleading, or not, provided that the adoption of the provisions of the Common Law Procedure Act as to that matter may be expedient and proper for making that which is properly called the practice, process, and mode of pleading upon the Revenue side of the Court of Exchequer, as nearly as may be uniform with the process, practice, and mode of pleading upon the Plea side of that Court. Upon that point, it is very material to see in what manner the Legislature, in these very Acts so referred to, has treated the subject now in hand, as materially necessary for the object of rendering more simple and speedy the process, practice, and mode of pleading in the Superior Courts of Common Law at Westminster. One of your Lordships observed, and my learned friend repeated the observation in his argument, that there is a sub-title with regard to that heading as to proceedings in error. My Lords, that scheme of sub-titles runs through the Act of Parliament, and I think throws a light not unworthy of your Lordships' attention upon the manner in which those words are used at the beginning of it. I have a very short abstract of the sub-titles. They begin thus:—Clause 1, with respect to writs, and so on; clause 26, with respect to appearance; clause 41, with respect to rejoinder; clause 42, with respect to declaration; clause 49 is with respect to language and form of pleading; clause 28, with respect to the time and manner of declaring; clause 62, with respect to pleas and subsequent pleadings; clause 91, with respect to examples of

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statements, and so on; clause 92, with respect to judgment by default; clause 97, with respect to new trial and inquiry; clause 100, with respect to judgment by default; clause 102, with respect to the *nisi prius* record; clause 103, with respect of juries and jury process; clause 117, with respect to the admission of documents; clause 120, with respect to execution; clause 128, with respect to proceedings for revival; clause 155, with respect to the effect of death, &c.; clause 143 with respect to motions to arrest judgment; clause 146, with respect to proceedings in error; clause 168, with respect to actions of ejectment. Your Lordships will see that that scheme runs through the whole. The whole subject necessary to be dealt with for the recited purpose of rendering more simple and speedy the process, practice, snd mode of pleading in the Superior Courts of Common Law is dissected, so to say, into those heads, and is dealt with by the particular clauses coming under these different heads; including error, as a most important portion of them.

Now, my Lords, I think it becomes important, bearing in mind that we have got here a power to extend, apply, or adapt any of the provisions of this Act without exception, as may seem to the judges expedient for making the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with that on the other, to observe how these Common Law Procedure Acts deal with, and to what extent they deal with, the process and practice as to error and as to appeal. What they really do is this, they deal only with two subjects, both those subjects properly coming within the meaning of the words "process and practice" of the Courts themselves. Those two subjects are the record of the cause, which belongs to the Court below, which begins there, and which ends there, and which, if temporarily removed from it, is returned back into it with such corrections as it may have received. They deal with that record which is the record of the Court of Exchequer, and as to which I apprehend anything which does not govern the whole mode of dealing with it fails to govern the whole of the process, practice, and pleading of that side of the Court. The other matter they deal with is, the proceeding to error, which is to be a step in the cause. There I think we have almost the *cardo causæ*. Here I agree with my learned friend that in one or two places in the judgments the words "in error" were substituted for "to error;" and I also wish your Lordships' attention to be directed to the difference, for it seems to me that we have here that upon which the whole of your judgment may depend. I say that from the time these provisions came into operation they operated upon the Plea side; and from the time when the Queen's Remembrancer's Act was passed the proceeding to error became a step in the cause. The right, therefore, to have errors in law corrected, either in the one way or the other, attaches by the proceedings which these Acts make a step in the cause in the Inferior Court, which is the proceeding to error.

When that argument is attended to, it very much sweeps away the difficulty which has been spread around this case. These Common Law Procedure Acts do not interfere with the particular practice, either of the Exchequer Chamber or of the House of Lords, or of any other Court of Error. What they do is this,—they make the proceeding to error a step in the cause; they regulate the proceeding, all of which is matter of process or practice, in the Court below itself; they launch the case from thence into that which was previously by law, as from that Court, the Court of Error, and which will of course proceed to deal with it and to correct the error according to its own methods of practice. The Acts, again, take up the matter of practice as to the record of the Court which has come from below, and which passes through the Court of Error, being still the record of the Court below, and having to be returned corrected to the Court below. And those rules confine themselves entirely to ushering into the Court of Error by those steps which are steps in the cause in the Court below the proceeding by way of error or appeal; correcting the record of the Court below, and returning it, in order that execution may be had.

Lord Chancellor.—They do much more than that. The Act of 1854 said, the Court of Error shall open its doors to the reception of a particular appeal, and those rules also say that the Court of Error shall open its doors to the reception of a particular appeal.

Mr. Attorney General.—I say they usher it into the Court of Error. They say that the proceeding to error shall be a step in the cause; the proceeding to error of course implies the rest.

Lord Chancellor.—That is a mere form.

Mr. Attorney General.—Surely, my Lord, with great submission, it is not merely form, but very great substance. If there is to be a step in the cause, which is the proceeding to error, it is impossible to say that that is not substance. There are forms added, as to the way in which that step is to be taken; but the essence of the case is, that the proceeding to which the right of appeal attaches, and the right of going to the Court of Error attaches, is to be taken in the Court below. Of course it follows that the Court of Error is to open its doors to the case. The Legislature has said that in those cases with which it has dealt in the Acts of 1852 and 1854, the case being initiated in the Court below, and the proceeding to error being taken in the Court below, it is to be brought thence to the proper Court of Error, as every other case comes there. But all that is to be done there, except as regards the alteration of the transmitted record which is to be returned, and in fact all matters of practice as to the mode of hearing, and so on, which would be regulated by the separate practice of the Court of Error, are left untouched. The Act has said that certain steps taken in the Court below shall carry with them a right to go to the Court of Error by way of appeal or error, and those

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steps shall be taken in the Court below. And though it does not say in so many words that the proceeding to appeal shall be a step in the cause, it says so in substance, because it directs that in order to take that proceeding you are to take similar steps in the Court below. The 55th section of the Act of 1854 says, that upon certain things being done in the Court below, either the right of appeal shall take effect at once, or the Court in its discretion may, if it think fit, allow the appeal. Then notice of appeal is to be given in that Court. There is to be a stay of execution in that Court. The case is to be settled by the Judges of that Court, and carried thence to the Court of Appeal. So that all those steps that are matters of procedure in the Court below are steps of proceeding to appeal, and the case is launched, whether by way of error or by way of appeal, in the Court of Error, there to be determined, and to be sent back again with a corrected record.

My Lords, of course it was absolutely necessary to say that for this purpose the Court of Error should be the Court of Appeal, but with that exception everything which these Acts do is to regulate simply the steps to be taken in the Court below, to usher and introduce the cause into the Court of Appeal by virtue of the right of appeal which has accrued in the Court below, and then to have the record corrected, and sent down to the Court from which it came. So that it is in substance a dealing with the process and practice of the Court below upon matters of law arising upon its judgment, which must of necessity carry with it the transition through the Court of Appeal or Error; and it only does so that justice may ultimately be done in the Court below, and that the errors of that Court may be corrected. It effects that only by the substitution of one mode of proceeding for another — a procedure by way of appeal upon matter of law arising upon a motion for a new trial, instead of by a bill of exceptions, by which means the same points might have been raised, though in point of form in a different way. That practice had been established upon the Plea side by these former Acts. And this, the 26th section of the Queen's Remembrancer's Act, says, that there is to be the power to extend and apply any of the provisions of those two Acts as may seem expedient for making the process, practice, and mode of pleading upon the Revenue side of the Court of Exchequer as nearly as may be uniform with that on the Plea side.

Now, my Lords, the proposition which I think your Lordships fully understood, when I advanced it in the outset upon this point, is, that according to the plain meaning of these words the Court may extend any of those provisions, provided that their extension has a tendency to produce the uniformity which is pointed at as what is to be attained. That uniformity we submit not only will be promoted by the adoption of those provisions which relate to the procedure in error and appeal in the Court itself, and with respect to the correction of its record, but without them there will be the most important and substantial

difference which will prevent the desirable uniformity being obtained. Your Lordships will observe how absolutely that uniformity is pointed at as the object to be attained. My learned friend put some imaginary cases, of a capricious exercise of its power by the Court of Exchequer, not applying all that ought to be applied in order to give fair effect to the provisions themselves. I say that the Legislature has placed confidence in the Court of Exchequer, as knowing the peculiarities of the Revenue practice, and what adaptations would be necessary in order to execute these provisions properly, the Legislature having declared its object to be to attain the greatest possible amount of uniformity between the Revenue and Plea sides. I am satisfied that there are no provisions better adapted for the purpose than these, in the Act of 1854, from beginning to end. The Legislature has not trusted it to the Barons to exercise a vague and general discretion as to what to adopt and what not. It has pointed out the principle upon which they are to go, namely, to make the procedure on one side as nearly as possible uniform with that upon the other,

It was suggested that these words "as nearly as possible" pointed out, as of course they do, and as indeed the word "adapt" does, that there might be some points as to which the procedure could not be made absolutely uniform. But this is a step which, according to the common sense of mankind, and the natural meaning of the words, will tend to produce the nearest practicable approach to uniformity. And if those provisions are applicable, is not it clear that the Legislature has pointed to them as provisions which it is expedient to adopt? Of course, my Lords, upon that subject there is very great force in the consideration which was pressed by Lord Chief Justice Erle and Mr. Justice Willes, that this really resolves itself only into a matter of procedure. It is a different mode, which has been found by experience, and adjudged by the Legislature, when dealing with the Plea side, to be a better and more convenient mode, of bringing before a Court of Error the very same questions of law which might be raised by a bill of exceptions. If it were not so, of course very different considerations might arise. But when that is left in that way, it is not really in substance giving a new right of appeal; it is giving a new mode of exercising the original right of appeal. For from the time when this Queen's Remembrancer's Act passed, giving the right of proceeding by bill of exceptions, it has been the right of a party to raise questions of law which have been erroneously determined at the trial, for the consideration of the Court above. And this is only a new mode of doing the same thing by a procedure which has been adjudged by the Legislature in other cases to be more convenient.

My Lords, there was some observation made upon the words occurring in the latter branch of the clause which authorized the Judges to extend, not only any of the provisions of those two Acts of Parliament, but also any of the rules of pleading

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and practice upon the Plea side of the Court. An observation, I think, fell from the Lord Chancellor while the argument was in progress, suggesting whether that might not have been done under the first branch of the section. The answer to that no doubt has, upon consideration, occurred to his Lordship. It is plain that it might have been done as to those matters which fell within the first branch of the section, and within the general antecedent powers of the Court; but with regard to those rules and orders, which are entirely dependent upon the provisions of the Common Law Procedure Acts, and which are made by virtue of those Acts to carry into effect their provisions, those rules and orders would be relative to the Common Law Procedure Acts, and could not, *per se*, have been introduced except in connection with the statutory enactments, on which they themselves depended.

My Lords, I do not think I need advert at all to that argument of my learned friend Sir Hugh Cairns, for it seemed to me to be disposed of by your Lordships while he was addressing you, in which he endeavoured to argue from the language of the 42nd section of the Act of 1854, and the 157th section of the Act of 1852, that the Courts of Error by those Acts had power to award an independent process, and not merely to correct the error of the Court below, and return the record with the judgment that ought to have been given. Now the fallacy of that argument is easily pointed out. The words are, "to award process;" that does not mean to issue process or execution, but merely to alter the order so that that which ought to have been awarded shall be awarded.

Now, my Lords, I will pass to what was called the retrospective effect of the rules, which was for the first time brought to your Lordships' attention here. I do not think it had been lost sight of below, but it was not advanced there; however, it is now advanced. I think you must have been struck with a certain degree of hesitation in the way of putting it. Once or twice your Lordships put a question of this kind: You argue that the Court of Exchequer had at all events no power to apply those rules to pending proceedings? But my learned friends desired not to be understood as putting it in that way. They said, not so. We admit that many authorities can be adduced to show that these Acts and rules would apply to pending proceedings; but then they must be so applied as not to nullify the effect of what has gone before. That was the substance of the argument.

Now when the authorities are fully brought under your Lordships' notice I think you will find that they are very clear upon this subject. The authorities all agree, that, whilst rights are not taken away directly by the operation of an Act of this kind, unless by the plainest and most express words, yet procedure is regulated by them *primâ facie* from the very instant when they come into operation, and that in a sense which applies to all subsequent steps and stages of every cause which is

then depending. Then, in applying these rules, we shall find that their application has been this; in the first place, although it may seem a hardship, yet when an action which has been commenced under one state of the law with respect to costs shall be concluded under another state of the law with respect to costs, the costs, which had been incurred under one state of law as to taxation and allowance, shall be disposed of eventually under another. Nay more, that a party shall be liable for costs under the operation of these statutes to an extent to which he was not liable when the action was brought. To that extent the cases have gone. The cases on the other side imposed no other limitation upon the rule than this, than when a step had actually been taken, the effect of that particular step should not be nullified and destroyed by the subsequent operation of intervening legislation; and where a consent had been given which had a certain meaning and construction before the Act was passed, the effect of that consent shall not be different after the Act from what it was before, it being in all cases a question of construction upon the words of the Act. But no case has said, that, because the trial has taken place before the Act, therefore the subsequent proceedings which would follow in due course shall be treated as exceptions to what has been established as the general rule, whether those proceedings be with regard to making a motion for a new trial, or with regard to the mode of conducting the new trial, if granted, or the question of right to appeal or not to appeal from the rule granting or refusing a new trial. I will take the cases in order of time, both those which were referred to and those which I shall have to ask your Lordships to refer to, and show the reasons why they are perfectly consistent; all tending to show this objection to be untenable.

The first authority I will mention is the case of Cox v. Thomason, 1st Crompton and Jervis, 498. I mention that, passing over an earlier decision, because that earlier decision may have gone further than the others do, in fact, going so far as to take away the right. It was commented upon by one of your Lordships, and therefore I do not think well to refer to it. The case of Cox v. Thomason was a question arising upon a rule of Court made in Hilary Term, upon the 2nd William 4th, chapter 74, as to the taxation of costs. The point determined was this:—"The rule, Hilary Term, 2nd William 4th, section "74, is prospective, and applies to all taxations after the com-"mencement of Easter Term." Of course upon that word "prospective" I observe that we do not say it is retrospective. We do not annul the effect of anything that has taken place before; but we say, with regard to all subsequent steps whatever in the cause, the new rule governs; whatever has taken place before having been governed by the old rules; and the effect of what has taken place before is not altered by the application of the rule to what follows. In that case the learned Judge (it was Mr. Baron Bayley) said, with regard to the objection taken to the application of the rule; "The question in this case turned on the

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" construction of the rule of Hilary Term, 4th William 4th, " section 74; and, cause having been shown on the last day of " last term, we did not decide it then, that we might consult the " other Judges. By the rule relied on, no costs are to be allowed " on taxation to a plaintiff upon any counts or issues on which " he has not succeeded, and the costs of all issues found for the " defendant are to be deducted from the plaintiff's costs." It was a deduction of the costs of issues found for the defendant, there having been no rule to make such a deduction in the taxation of costs before. " On showing cause it was urged that he was " not, on two grounds; 1st, that costs could only be deducted " from the defendant where distinct issues are joined on distant " pleas, and that the general issue was here indivisible; and " 2nd, that the rule not having come into operation till the first " day of Easter Term, did not apply to costs which were incurred " previously. All the courts, however, agree in opinion that a " distinct issue is raised on each count by the general issue " pleaded, without restriction, and therefore that the defendant " is equally entitled to a deduction from the plaintiff's costs in " respect of counts found for him as if issue had been joined on " each of those counts, by pleading separately each. As to " the other point, we are decidedly of opinion that the new " general rule applies to every taxation which took place after the " commencement of Easter Term last. The Court of King's Bench " agrees with us in this construction of the rule; and the " Court of Common Pleas does not differ, although it is not so " strongly of that opinion as this Court, and the Court of King's " Bench."

Lord Cranworth.—Will you just read the rule?

Mr. Attorney General.—The effect of the rule, my Lord, was this. This is the way in which it is stated in the judgment, " by the rules relied on, no costs are to be allowed on taxation " to a plaintiff upon any counts or issue on which he has not " succeeded, and the costs of all issues found for the defendant " are to be deducted from the plaintiff's costs."

Lord Chancellor.—When was that rule directed to come into operation?

Mr. Attorney General.—The rule was directed to come into operation on the first day of Easter term 1832, as I collect, and those costs had been incurred before it came into operation.

Lord Chancellor.—After it had been published?

Mr. Attorney General.—No, my Lord, I do not understand that at all. It is not stated; it is not so stated that the costs were incurred after it had been published.

Lord Chelmsford.—When was the taxation? Was it in Easter term?

Mr. Attorney General.—After Easter; the rule was made in Hilary term, in the 1st William 4th; it was to come into operation on the first day of Easter term.

Lord Cranworth.—Very likely the trial was at the assizes between Hilary and Easter terms.

Mr. Attorney General.—I do not see that that is noticed in any way whatever; it is quite clear, forming my opinion from the judgment. that it did not turn upon such a distinction.

The next case I will mention is Freeman v. Moyes; 1st Adolphus and Ellis, page 338. The marginal note is this; "Under 3rd "and 4th William 4th, chapter 42, section 31, executors are "liable to costs in actions commenced before the statute came "into operation and tried afterwards." It was so held by Lord Denman, and by the rest of the Court, Mr. Justice Littledale apparently having been inclined to a different opinion. Your Lordships will find that the case has been followed in several subsequent authorities, and is settled law. "This action was "commenced by the plaintiffs as executors in Easter Term "1832."

Lord Chancellor.—When did the statute pass?

Mr. Attorney General.—The statute passed in the 3rd and 4th William 4th.

Sir Hugh Cairns.—After the commencement of the action and before the trial.

Mr. Attorney General.—That is perfectly correct. The action had been commenced by persons who were not then liable for the costs for which they were made liable by the statute. "An action "was brought by the testator, but having abated by his death, "notice of trial was given for the London sittings in Michael-"mas term following; but the cause, being made a remanet, was "not tried till the sittings after Michaelmas term 1833, when the "defendant had a verdict. He afterwards took out a summons "for taxation of costs, under the statute 3 & 4 William 4th, "chapter 42, section 31." I may observe, my Lords, that if attention were paid to such an argument as has been offered here as to the effect of any trial, that the trial is to be treated as attracting to itself all the subsequent proceedings, and causing them to operate by relation to the date of the trial; so here you might say the cause was to go back to the time when it was set down for trial; it was made a remanet only for the convenience of the Court and the parties. That has never been done—it has never been held that in order to get a review of a trial, you were to treat all the subsequent proceedings as being *in gremio* of the trial itself. There is no authority for such a proposition.

Then it was argued that "The words of the clause in question "are retrospective. It enacts, that 'in every action brought,' "not 'to be brought,' by an executor, he shall be liable to costs. "That includes actions depending at the time when the Act "passed." Lord Denman said, "After reading the clause relied "upon in support of the taxation, said, upon enquiry we find "that both the Court of Common Pleas and the Court of Ex-"chequer hold that actions already commenced when the "statute came into operation, are within the meaning of that "section. The rule for setting aside the taxation will therefore "be discharged."

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Then my Lords, there is the case of Pickup *v.* Wharton, reported in the 2nd volume of Crompton and Meeson, page 401, in which the same point arose. The Court of Exchequer being informed that a similar question was depending in the Court of Queen's Bench, took time for consideration upon the case which was before them. But in Easter Term, "Mr. Justice Bayley "said, that the Court had conferred with the Judges of the "King's Bench, and that both Courts concurred in thinking the "statute retrospective." The Court of Exchequer, under the circumstances of that case, did not allow costs.

Then your Lordships will find, in the case of Grant against Kemp, that the same rule was followed; that case is reported in the 2nd volume of Crompton, and 172 Meesom, p. 136.

My Lords, we have also a more recent case in which the whole subject was very carefully considered, the case of Wright v. Hale, determined in 1860. It is reported in the 6th volume of Hurlstone and Norman's Reports, page 227. The marginal note is "The 23 and 24 Victoria, chapter 126, section 34, which "provides that when the plaintiff in any action for an alleged "wrong recovers by the verdict of a jury less than £5, he shall "not be entitled to any costs, if the judge certifies to deprive "him of them, enables a Judge to certify in an action commenced "before the passing of that Act." There was full argument, and all the former authorities, including those cited by my learned friends at your Lordships' bar, were referred to in the course of that argument, as well as the principle *nova constitutio futuris formam imponere debet, non præteritis.* The Judges gave this judgment. Lord Chief Baron Pollock said, "I do not think that "our decision will interfere with the great constitutional prin-"ciple to which the plaintiffs' counsel have referred. There is a "considerable difference between new enactments which affect "vested rights, and those which merely affect the procedure in "courts of justice, such as those relating to the service of pro-"ceedings, or what evidence must be produced to prove par-"ticular facts. If an Act of Parliament were to provide that in "matters of mere opinion no more than three witnesses shall be "called, after that no person would be entitled to call more than "three witnesses on such points in any pending suit, because it "would be a mere regulation of practice. Rules as to the costs "to be awarded in an action are of that description, and are not "matters in which there can be vested rights. When an Act alters "the proceedings which are to prevail in the administration of "justice, and there is no provision that it shall not apply to suits "then pending, I think it does apply to such actions. Here the "plaintiff had an opportunity of discontinuing the suit. The "Act passed on the 28th August, and contains a provision that "it should come into operation on the 10th of October. The "34th section enacts that where the Plaintiff in any action "for an alleged wrong in any of the Superior Courts recovers "by the verdict of a jury less than £5, he shall not be entitled "to recover any costs if the Judge certifies to deprive him of

" costs. This is an act to be done at the trial, which was after " the passing of the Act. I think, then, that we are not giving " to the Act any retrospective operation, and the wrong supposed " to be done by an *ex post facto* law does not arise. The " rule must be discharged."

The same opinion was expressed by Mr. Baron Bramwell, Mr. Baron Channell, and Mr. Baron Wilde. Mr. Baron Channell referred to the authorities I have mentioned. Mr. Baron Wilde says, " I am prepared to decide this case upon principle. " The rule applicable to cases of this sort is, that where a new " enactment deals with rights of action, unless it is so expressed " in the Act, an existing right of action is not taken away. " But where the enactment deals with procedure only, unless " the contrary is expressed, the enactment applies to all actions, " whether commenced before or after the passing of the Act " That this is the true principle sufficiently appears from the " cases that have been referred to on both sides." (Including Moon and Durden, and the other case which was cited to your Lordships.) " The cases cited by Mr. Chambers are cases re- " lating to rights, which were not affected; those referred to by " Mr. Hawkins were cases relating to procedure. Enactments " as to costs have been held by all the Courts to apply to actions " commenced before the passing of the Acts in which they are " contained. In Cox v. Thomason it was held that a rule of " Court relating to the taxation of costs, which was general in " its terms, applied to all taxations after the period when it " came into operation, whether the action was commenced before " or not. Mr. Chambers says that the enactment now in " question takes away a right from the plaintiff. I do not agree " with him. The right of the suitor is to bring an action and " have it conducted according to the practice of the Court. " Pending the action the procedure may be varied, but his right " is to have his action conducted according to the existing " course of procedure, whatever that may be."

I cannot help submitting that there is very great good sense in that passage, and great good sense in it as applied to a case like that before your Lordships. Such a result is equally beneficial to both parties. The decision of the Court in this case might have been against the person who got the verdict, and it might be so in any other case. Nobody can ever tell when a question of law is involved, and a new trial is moved for, that a new trial may not be given upon the view of the law taken by the party moving, or that it will be refused. You never can tell in this or any other case how the motion for a new trial upon a point of law may be decided by the Court. An intervening rule, therefore, which gives the same right of appeal upon a matter of law as would exist by a bill of exceptions, is in truth a rule conferring a right which is beneficial to the party, whoever he may be, against whom that motion for a new trial may be ruled. We cannot *a priori* determine who it will be. The case would have been one of great hardship towards the party who now wishes to resist the right of the Crown, sup-

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posing three Barons instead of two, in the Court of Exchequer, had been of opinion that the law had been wrongly laid down to the jury, and if a new trial had been thereupon given. The party would then have been obliged to go down to trial again, and would have had to tender his bill of exceptions at the proper time, and finally to bring that bill of exceptions to the Court of Exchequer Chamber, and it might be to this House. That is what might have happened.

I do not ask your Lordships to try the question before you by this or by any imaginary case, but you must have one rule for all cases. Such a case as I have instanced is obviously liable to happen; when there is a point of law raised at the trial, and a motion for a new trial is made upon the ground that the law was wrongly laid down, it is, of course, possible that the Court may rule it against the party who succeeded at the trial instead of in his favour. Therefore, a rule which says that such a decision shall be liable to appeal before anybody has got any right by means of that decision, is one which appears to me to be consistent with even-handed justice, and one which operates as well for the one party as for the other.

Lord Chancellor.—There was a very strong case with respect to the Statute of Frauds of this kind. A verbal promise was made to give a sum of money before the Statute of Frauds was passed. Then came the Statute rendering such a promise invalid, and afterwards an action was brought upon that promise, and it was held that the Statute did not bar the action.

Sir Hugh Cairns.—That case was mentioned in the judgment in the case in the Court of Exchequer, which was cited by my learned friend, Mr. Mellish.

Mr. Attorney General.—The ground of that decision, as well as of the decision in the case to which my learned friend, Sir Hugh Cairns, has just referred, of Moon v. Durden, upon the Wager Act, was this, that the effect of a restriction which would have prevented such an action being brought, was to take away the right; it was not merely to regulate the modes of procedure to enforce the right; it was to take away the right.

Lord Chancellor.—There was evidence of a promise in the other case which I have referred to.

Mr. Attorney General.—Yes, my Lord, and the promise so made was a promise upon which an action might be maintained before the passing of the Statute of Frauds. But, by that Act it was said no action shall be maintained upon a promise which is not made in a particular manner.

Lord Chelmsford.—If the action had been pending at the time it would not have affected it; it would not have taken away the right of the party to recover upon a verbal promise. The words of the Act were, "no action shall be brought."

Mr. Attorney General.—Yes, my Lord, as I understand, the Court which decided that case looked at the substance of the matter, and they saw that to apply the Statute to an antecedently-made promise, would be to take away the substance of the right, and to say that there should be no remedy for a right

which the law recognized before, and which had its appropriate remedy. If your Lordships look at the words of the Statute, you will find that the words of the Act were such that it may be construed as only intended to apply to contracts afterwards made. And when you are dealing not with a question of procedure merely, as in the case of Wright v. Hale, but with that upon which the substance of the enjoyment of the right depends, you will not construe words which are capable of being applied to what was to happen afterwards as applying to anything else. It was with that view that I abstained from citing the case of Fowler v. Chatterton, in 6th Bingham, which was decided by Lord Chief Justice Tindal in a manner not quite consistent with the observations of one of your Lordships, in deciding the case of Moon v. Durden. Some remarks were made upon that case, from which it seems a natural inference that your Lordship doubted whether that case had been rightly decided.

Lord Cranworth.—I do not think I expressed any doubt about it.

Mr. Attorney General.—Your Lordship thought it was not rightly decided. Of course your Lordship would quite understand what I said. I did not think that Fowler v. Chatterton ought to be cited as an authority after what your Lordship said upon that case in Moon and Durden, having regard also to the principle, which was the principle recognized and distinguished from that applicable to procedure by the Barons in the case of Wright v. Hale. That application of the rule, or of the statute. in those cases, would in substance have taken away the enjoyment of a right which existed before, and which had its appropriate remedy. Here it does nothing of the sort; but simply introduces a new form of procedure, which, in events which are perfectly possible, may be as beneficial to one party as to the other; it is a rule aiming only at affording an opportunity of correcting errors of law which may be made in the course of that procedure. Surely it will be a very strange and extravagant thing to say that within the principle *Nova constitutio futuris formam imponere debet non præteritis*, and the cases which determine that you will not take away a right by *ex post facto* legislation, persons are to be supposed to have a vested interest in errors of law which may be committed by the Court, and to be entitled to say, You are taking away our rights, if you apply to the subsequent stages of the same suit a new and amended form of procedure which provides better than was ever provided before for the correction of errors of law. Your Lordships may accede to my learned friend's view of the subject; it would be presumptuous in me to anticipate what conclusion you may come to upon it; but I am quite sure that that view is entirely irreconcileable with the principles of the cases which I have referred to, and in no degree legitimately flowing from the doctrine laid down and decided in Moon v. Durden, and the earlier case upon the Statute of Frauds.

Adjourned for a short time, and resumed

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Mr. Attorney General.—My Lords, there was one other case which I should have mentioned to your Lordships in which the Act was held to apply to pending proceedings. And it was applied in a manner which may have had a very important effect. I mean the case of Cormish v. Hockin, in the first volume of Ellis and Blackburn, page 602. It was a case of the amendment of an endorsement upon a pluries writ under the Statute 2nd and 3rd William the 4th, chapter 39, section 10. The action was brought for a promissory note, and "a writ was "issued upon the 13th of October 1849, and the process had "been regularly continued in accordance with the Statute 2nd "and 3rd William 4th, chapter 39, section 10; except that, on "the fifth writ (pluries), dated 28th May 1851, the endorse-"ment stated, by mistake, the date of the first writ to be "22nd October 1849 instead of 13th October;" and that was an error as to which it was a serious question, whether it could by possibility have been amended except by the aid of section 222nd of the Common Law Procedure Act, 1852, which did not come into operation until after it had been done. The date on which the Common Law Procedure Act, 1852, received the Royal Assent was the 30th June 1852. I do not remember the exact date at which it came into operation. I think it was in Michaelmas Term. This (pluries) indorsement your Lordships see was dated on the 28th May 1851, before the Act even passed, much more before it came into operation; and if not amended it was fatal. This was the observation of Lord Campbell upon that point. He said, "I need not analyze the "decisions before the Common Law Procedure Act, 1852; they "are conflicting; but I rely on section 222 of that Act, which "really meets this case. The facts are, that the debt would "have been barred on the 22d October 1849; a writ was there-"fore sued out on 13th October 1849, and regularly continued. "Each pluries was in very good time, but one of them had a "clerical mistake in the endorsement, the 22nd of October being "inserted contrary to the fact. If this error stand, it prevents "the plaintiff from taking advantage of the writs which have "been regularly sued out; but if we may amend according to "the fact, the Statute of Limitations will not defeat the plaintiff. "Then does not the Act give us power to amend our own "record? The writ is our own record; and we have the first "writ to amend by. Now, when we take the words of section "222, with the preamble, to which Mr. Chambers properly "referred us, and when we find that we may amend, 'whether "'there is anything in writing to amend by or not,' 'for the "'purpose of determining in the existing suit the real question "'in controversy,' we find that we have a suit existing, and the "real question is, whether or not it is barred by the Statute of "Limitations. May we not order such an amendment as to "raise that question?" And generally it was held that they might under that section of the Act, although it had passed after the error had been committed, amend the error.

Now, my Lords, the cases which have been cited on the other side, when examined, appear to me to have no bearing at all in favour of the argument of my learned friend. First of all I will take the case of Hughes v. Lumley, which is the first of these reported in the 4th volume of Ellis and Blackburn, page 358. It was a case in the Exchequer Chamber upon the 32d section of the Common Law Procedure Act, 1854,

Now, with respect to that 32d section, a greater fallacy I think cannot well be imagined than that of my learned friend, Sir Hugh Cairns' argument, when he said that your Lordships were to interpret the 35th section by the 32d and the 34th. One of the cases cited was upon the 32d section, the other upon the 34th section. And I repeat that, whether you take the 32d or the 34th section, a greater fallacy cannot well be imagined than that which requires you to interpret the 35th section for this purpose by either of these two sections. The 32d section, upon which the case of Hughes v. Lumley was decided is this: "Error may be brought upon a judgment upon "a special case in the same manner as upon a judgment upon "a special verdict, unless the parties agree to the contrary." Then it goes on to regulate the proceeding. Now a special case could only be the subject of agreement, and on the very face of the clause an agreement to the contrary is contemplated as a thing which would exclude the bringing of error. It was determined in the case of Hughes v. Lumley, upon the interpretation of that clause, that it could not be meant to apply to special cases agreed upon before the Act came into operation. Mr. Baron Parke says at page 359, "After the verdict was "found, subject to the special case, neither party could fly "off. It was at that time that the agreement was come to; "the settling of the special case was only in completion of it. "The presumption in all cases is that an Act regulates the "future not the past, unless it appears by the Act that the "intention of the Legislature was otherwise.

"Now, here, instead of that appearing, the Act shows that "it was intended that that error was to be only on future special "cases agreed on afterwards, for it is only on such special "cases that the parties could agree not to bring error." The other learned judges concurred, and for these reasons they made the rule absolute. One of them saying, "the case is not within "the statute, if it were I think bringing error would be a "breach of faith, as no such course could have been contem-"plated when the verdict was found." In substance it was held, that, when that section speaks of a special case agreed upon by consent, it must have reference to a subsequently agreed on special case, because the terms of the consent involved that consequence; and error, which under the Act they might agree either to accept or to reject, could not possibly have been under consideration before the Act involving that alternative was passed. There was nothing else whatever determined in that case excepting that point, and that was determined upon this very clear principle.

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The case of Vansittart v. Taylor upon the 34th clause was exactly similar. The 34th clause is "in all cases of rules to "enter a verdict or nonsuit upon a point reserved at the trial, "if the rule to show cause be refused or granted, and then dis- "charged or made absolute, the party decided against may "appeal." The question was upon the interpretation of the words "a point reserved," words which, of course, do not occur in the 35th section any more than the terms "a special case "agreed upon" do. It was held that a point reserved, being as much a matter of consent and agreement as a special case, the same principle must be applied to it. Hughes v. Lumley was expressly relied upon as the authority, and Lord Chief Justice Jervis said that in that case there was no assent. He said, "According to the argument against this rule, the effect of "the subsequent Act is to make this reservation before the "Act equivalent to an assent by the parties that the point "should be reserved for the Queen's Bench and the Courts of "Error. There was, in fact, no such assent; and therefore I "think that Act must be construed as applying to points re- "served after the Act, and section 32, as to special cases, seems "to me to make it clear that such was the intention of the "Legislature." Of course, where you have the element of consent, and where that consent entitled the parties to accept or reject the mode of proceeding, leaving open error or appeal, it is quite obvious that that consent must be regarded as dating from the time when it was given, and not as being altered in its effect in consequence of something which afterwards takes place. It would be altering that agreement, and the consent of the parties, to consider a special case, in clause 32, or a point reserved at the trial, in clause 34, as relating to a special case agreed upon, or to a point reserved at the trial, before the Act was passed, inasmuch as the parties cannot possibly be supposed to have made their agreement upon that footing. That was the only thing determined in the case of Vansittart v. Taylor, and the sole foundation of the judgment, as in the other case.

Now, my Lords, what possible ground is there for saying that the principle of these judgments reaches to the 35th section? They turned upon the meaning of the words "special case agreed upon" in clause 32, and the words "point reserved at the trial" in clause 34, terms which do not occur in clause 35. Nor does the reason apply; because section 35 is a clause totally independent of any agreement between the parties whatever; it is merely a mode of raising as of right that question of error in law, which in another mode might be raised as of right, independently of this enactment. It is an involuntary change, which does not depend upon consent, of the ordinary and proper procedure of the Court. There do not occur, therefore, in clause 35, either the grounds of judgment, or the terms which were the subjects of decision in the cases upon two other clauses.

The case of Pinhorn v. Souster, which my learned friend, Mr. Mellish, relied upon, reported in the 8th volume of the Exchequer Reports, turned upon the construction of the 51st

section of the Common Law Procedure Act, 1852. The point was, that a special demurrer delivered before the Act came into operation was not abolished. Of course that is the actual effect of a step antecedently taken. The clause has not abolished it; it does not say that any subsequent step would not be regulated both as to the mode of taking it and as to its effects and consequences by the new procedure; but the antecedent step is not obliterated; and that of course involves this plain principle, that when a step is taken upon which you have a right to have the decision of the Court at the time, if the Court, for the convenience of its arrangements, does not make its decision at the time, then it would be most unreasonable to say that the step is to fail of its proper and legitimate effect, and not to be followed out altogether, simply, because an Act has been passed which says it cannot be taken afterwards. Now, my Lords, the 51st section of the Common Law Procedure Act, 1852, upon which that case turned, is in these terms: "No pleading shall be "deemed insufficient for any defect which could heretofore only "be objected to by special demurrer." But this particular pleading had been theretofore objected to by a special demurrer, and that section does not in any way whatever take away the effect of an objection competently made before; but it only says that henceforth no pleading shall be deemed insufficient for such a defect. Then, my Lords, there was another case cited, not for a decision but for a dictum. I suppose one dictum is as good as another, and I can oppose to that another case in which a different view was taken by the learned Judges, though it was not the ground of their decision. And in that very case of Jenkins v. Betham, in which the dictum of Lord Chief Justice Jervis occurred, I think it would be impossible for your Lordships to read it without seeing that the result of further argument upon the point was that the Court did not think fit to found anything in the judgment upon that which had been thrown out in the course of the argument by Lord Chief Justice Jervis. In the case of Jenkins v. Betham, reported in 15th volume of Common Bench Reports, page 168, this is the marginal note; "One who holds himself out as a valuer of ecclesiastical pro-"perty, though he is *not* bound to possess a precise and accurate "knowledge of the law respecting the valuation of dilapidations "as between outgoing and incoming incumbent, *is* bound to "bring to the performance of the duty he undertakes a know-"ledge of the general rules applicable to the subject, and of the "broad distinction which exists between the cases of a valuation "as between incoming and outgoing tenant, and a valuation as "between incoming and outgoing incumbent." That is the whole of the principal marginal note, which I read, in order that you might see how totally silent it is as to any point of this kind having been really ruled or determined in the case. Then there is a very long account of the facts; and at page 189 we find that a rule absolute for a new trial was made, and then afterwards this took place, which is also reported at page 189. Mr. Mellor, for the defendants, "applied for leave to appeal under

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" the 35th section of the Common Law Procedure Act, 1854, " 17 & 18 Vict. c. 125, which enacts, that, 'in all cases of " 'motions for a new trial,'" and so on, stating the clause. As soon as Mr. Mellor opened it, Chief Justice Jervis, when this section was read, made the observations which my learned friend quoted: " Lord Chief Justice Jervis.—The 35th section is not retro- " spective; its language shows that it could only have been " intended to apply to cases where the trial has taken place " since the passing of the Act. In Hughes v. Lumley, 19th " Jurist, 60, the Court of Error decided that the 32nd section, " which provides that error may be brought upon a special case, " unless the parties agree to the contrary, is not retrospective." Now that was an observation made in an interlocutory way by Chief Justice Jervis; and obviously his Lordship had not present to his mind at the time the principle upon which Hughes and Lumley was determined, namely, that the agreements of parties were not altered by the effect of the 32nd section. The argument went on, and Mr. Mellor advanced further reasons, and the result was, that in the judgment which the Court gave there was no mention whatever of that point, but it went upon an entirely different ground. Lord Chief Justice Jervis finally said this: " We agreed with the ruling of the Judge; but we think the " jury have not arrived at a right conclusion. The last words " of the 35th section, 'provided, that when the application for a " new trial is upon a matter of discretion only, as on the ground " that the verdict was against the weight of evidence, or other- " wise, no such appeal shall be allowed,' are against you. The " rest of the Court concurring." I think, my Lords, I have quite as good a right to take the words of the final judgment, and say, that the Court thought that the section would apply, but that it was not a case for acting under it, as my learned friend has for referring as his authority to observations thrown out by a Judge during the argument, which were not repeated in the final decision in which the rest of the Court concurred. The facts show that at first sight it appeared to Lord Chief Justice Jervis that section 35 did not apply; but that the Court did not adopt that conclusion, and the decision was given upon the assumption, that it did apply to the case.

Then, my Lords, there is another case in which, though the point was not determined undoubtedly upon the 35th section, still it is perfectly plain that Lord Campbell and the rest of the Court assumed that section to apply. It is as good an authority as anything in Jenkins and Betham. The case I refer to is Gurney v. Womersley, reported in the 4th volume of Ellis and Blackburn, page 133. That was a case involving a point of law, as to which the Court were against granting any rule, and the rule was refused. I may mention that the trial in question had taken place previously to the passing of the Act, and therefore of course before it came into operation. The trial took place at the sittings after Trinity Term, 1854, and the Act received the Royal Assent on the 12th of August in that same year, and came into operation in October or November. That being the case, the rule

having been refused upon the point of law, and the Court having been unanimous, Mr. Bramwell applied "for leave to appeal "under the Common Law Procedure Act, 1854, on the ground "of misdirection." The Court took time to consider; and on a subsequent day Lord Campbell said, "That after the repeated "decisions the Court thought it must be considered settled law "that the Plaintiffs were, under such circumstances, entitled to "recover the money paid, as paid on a consideration which had "failed. That being so, the Court, upon consideration, thought "that it ought not, in a sound exercise of its discretion, to give "leave to appeal."

My Lords, in neither the one case nor the other was any point decided one way or the other upon the subject.

Sir Hugh Cairns.—The objection was not taken.

Mr. Attorney General.—No, nor does the objection appear to have been taken in the other case; for I think that both cases were *ex parte*, there being no opponent where an application is made to the Court in its discretion to give an appeal. In both cases the Court decided upon the construction of the 35th section, upon the assumption that it applied. In neither case was there anything said which I think can govern your Lordships' decision upon the construction of that section which is now before us. These, my Lords, I think, are the only authorities.

I must not omit to notice what one of your Lordships noticed while the argument was going on, and which I cannot help thinking has a bearing much in my favour; I mean the proviso at the end of the 19th section of the Queen's Remembrancer's Act. You will recollect that that section runs thus: "A Writ of "Error shall not be necessary or used in any suit or proceeding in "error on the Revenue side of the Court of Exchequer, and the "proceeding to error shall be a step in the cause."

Lord St. Leonards.—I thought you had disposed of that.

Mr. Attorney General.—My Lord, I have disposed of everything in it excepting the proviso.

Lord St. Leonards.—I thought you had argued very much at length upon that also.

Mr. Attorney General.—I am not going, my Lord, to repeat any part of my former argument; but I have not said a word upon the proviso as bearing upon the present aspect of the argument. I think your Lordship noticed its bearing, if I do not deceive myself, when my learned friend Mr. Mellish was addressing your Lordships. "A Writ of Error shall not be "necessary or used in any suit or proceeding in error on the "Revenue side of the Court of Exchequer, and the proceeding "to error shall be a step in the Cause, and shall be taken in "manner and subject as to such terms and conditions as to "giving bail or security as may be directed by any rule or "order made by the Barons under this or any other Act or Acts "of Parliament authorizing the same; provided that nothing "herein contained shall invalidate any proceedings already "taken or to be taken by reason of any Writ of Error issued "before the commencement of this Act, or before such rules and

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" orders come into effect." So far as relates to the rules and orders as to error there contemplated, I submit that it is manifest upon the face of that clause, that nothing is saved except the effect of proceedings under Writs of Error already issued, or to be issued before the orders came into effect; and that, with regard to any proceedings whatever as to error consequent upon what had gone before, those proceedings, if no writ of error had been issued before the orders came into operation, would be governed by the rules made under this section in pending as well as all other suits.

Therefore, my Lords, my inference is this, that as to any rules and orders to be made under the 26th section, if it was within the competency of the Court to make such rules and orders upon the subject of appeal, they would be subject to a similar and only to a similar limitation; that is to say, that any proceeding actually taken before would not have had its own immediate and proper effect altered by reason of the introduction of these rules; which I say the introduction of these rules does not alter. With regard to the trial and the verdict, the verdict is not the final step. The next step is the motion for a new trial. The Court, upon the hearing of that motion, may decide the point of law raised upon it, and they may either grant or refuse the motion. And if certain intervening rules make that subsequent action of the Court liable to appeal, it is not altering the immediate and proper effect of anything which has gone before; it is merely introducing a procedure which operates upon all which is to follow. Otherwise, you might just as well say that every step, from the commencement of an action downwards, attracts to itself, as by relation, all subsequent proceedings in the action as say that the mere trial or verdict is to be taken as final in this sense; that all the subsequent procedure is to be taken as having relation to that. There is no more reason for that with regard to the verdict and the trial, than there is as to any other proceeding in the cause.

Lord Chancellor.—The House will take time to consider its judgment.

Adjourned to Thursday next.

Thursday, 17th March 1864.

Lord Chancellor.

Lord Chancellor.—My Lords, I take this opportunity of mentioning to your Lordships that those of their Lordships who attended the hearing of the important appeal in the case of the Attorney General v. Sillem will be prepared to give their judgment in that appeal at a very early day on which the House shall sit on appeal after the recess.

Wednesday, 6th April 1864.

DECISIONS OF THE LORDS SITTING ON APPEAL.

Lord Chancellor.

Lord Chancellor.—My Lords, this appeal depends on the question whether the rules made by the Court of Exchequer on the 4th of November 1863 are warranted by the power contained in the 26th section of the statute of the 22nd and 23rd year of the Queen, commonly called the Queen's Remembrancer's Act.

The second Common Law Procedure Act which, passed in the year 1854, contains many important enactments with reference to the jurisdiction of the Superior Courts of Common Law, and some of the most important are the provisions that create new rights of appeal. In jury trials at Common Law grave questions frequently arise, and are decided on motions for a new trial or on rules to enter a verdict or nonsuit; but from the decisions of the Court so given there was not before the Act of 1854 any right of appeal.

The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given and the Court to which it is given must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the legislature to have given to either tribunal, that is to the Court of the first instance and to the Court of Error or appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court and an extension of the jurisdiction of another. A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction. Accordingly, it was necessary in the Act of 1854, not only to give new rights of appeal, but to define and bind certain Courts to entertain the appeal so given, and this is done by the 36th section of the Act, which declares that the Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for the purposes of the Act.

The Common Law Procedure Act of 1854 was, like the Act of 1852, limited to the Superior Courts of Common Law, and from the manner in which the Act was expressed these words intentionally excluded that Court which is called the Revenue side of the Court of Exchequer. It required, therefore, another exercise of legislative authority to make the special provisions of the Act of 1854 which had created new rights of appeal in the other Courts applicable to suits as between the Crown and the subject in the Court on the Revenue side of the Exchequer. In making

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the orders now in question the Barons of the Court of Exchequer have assumed that a discretionary power to exercise this legislative authority or not, and thereby to confer or to withhold this important benefit of new rights of appeal, has been given to them by the 26th section of the Act of 1859. If the legislature has done this it has done a thing which is very irregular, and which antecedently would seem to be very improbable.

It is not reasonable to suppose that in matters affecting the taxation of the subject the legislature would abdicate its own functions, and delegate to the Barons of the Exchequer the power of determining at their pleasure whether in certain cases there should or should not be a right of appeal as between the subject and the Crown.

This improbability is much increased when attention is directed to the particular provisions of the statute in question, namely, the Queen's Remembrancer's Act. The 10th section embodies and applies (with some slight differences) to the Revenue side of the Court the provisions as to error and appeal contained in the 46th section of the Common Law Procedure Act of 1852 and the 32d section of the Act of 1854.

New rights of appeal are created and regulated by the 12th, 13th, 14th, and 15th sections. By the 16th section special legislative provisions as to the examination and attendance of witnesses, together with the provisions contained in the 46th, 47th, 48th, and 49th sections of the Act of 1854, are expressly extended to suits and proceedings on the Revenue side of the Court of Exchequer; and in the 18th and 19th sections are contained express enactments regulating proceedings in error on the Revenue side of the Court, and embodying the 146th and 147th sections of the Act of 1852; and by the 20th section the power of appealing to a Court of Error by means of a bill of exceptions is for the first time created on the Revenue side of the Court.

Suits, therefore, between the Crown and the subject on the Revenue side of the Exchequer are by these express enactments put on the same footing with respect to proceedings in error as suits between subject and subject in the Courts of Common Law, with the exception only of the right of appeal from interlocutory orders given by the 34th and 35th sections of the Act of 1854. It is difficult to resist the impression that these last-mentioned rights of appeal were intentionally omitted by the legislature as not being expedient in Revenue cases; but it is much more difficult to accept the proposition of the Crown, that these rights were left by the legislature to be conferred or not, at the pleasure of the Chief Baron and two or more Barons of the Court of Exchequer. These improbabilities and difficulties must of course yield to any enactment expressly declaring that such is the intention of the legislature, but they are of sufficient weight to render it necessary that the language of such alleged enactment shall be clear and unequivocal, and not admit of any other reasonable construction.

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With these observations we come to the construction of the 26th section of the statute. It contains two distinct powers given to the Lord Chief Baron and two or more Barons of the Court.

By the first power they are authorized to make rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court. Here the word "practice" is used in its common and ordinary sense, as denoting the rules that make or guide the *cursus curiæ*, and regulate the proceedings in a cause within the walls or limits of the Court itself. Under this power any rule might be laid down by the Barons for the guidance of their own proceedings that did not require express legislative sanction. By the second power conferred by the 26th section the Lord Chief Baron and two other Barons are authorized to extend, apply, and adapt to the Revenue side any of the provisions of the Common Law Procedure Acts of 1852 and 1854, and any of the rules of pleading and practice on the Plea side as may seem to them expedient for—that is, for the purpose of making the "process, practice, and mode of pleading " on the Revenue side as nearly as may be uniform with the " process, practice, and mode of pleading on the Plea side."

First, it is admitted on all hands, and if not it is clear, that the provisions in the Acts of 1852 and 1854, which may be thus extended, applied, and adapted, must be provisions relating to process, practice, and mode of pleading. Uniformity of process, practice, and pleading on both sides of the Court is the object of power, and defines its extent.

Secondly, it is very difficult to give to the words "process, " practice, and mode of pleading," in this second power, a different meaning or extent of signification from that which they bear in the first power given by the prior part of the section.

Taking then the word " practice " as equivalent to the *cursus curiæ* or regulations of proceedings within the Court itself, the question is whether the 34th, 35th, and 36th sections of the Act of 1854 can with any propriety of language be denominated provisions or rules respecting process, practice, and mode of pleading. This is a question of verbal nicety depending on nice shades of meaning in a word. The 34th, 35th, and 36th sections of the Act of 1854 create, as I have said, new rights of appeal. An appeal is the right of entering a Superior Court, and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal. The mode of proceeding may be regulated partly by the practice of the inferior, and partly by the practice of the superior tribunal, but the appeal itself is wholly independent of these rules of practice. The right to bring an action is very distinct from the regulations that apply to the action when brought, and which constitute the practice of the Court in which it is instituted. So the 34th and 35th sections of the Act of 1854, which create new rights of appeal, and the 36th section, which defines and binds certain Courts to

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receive and determine such appeals, cannot with any accuracy or propriety be termed provisions which relate to process, practice, or mode of pleading, either in the Court appealed from or that to which the appeal is to be made. They are enactments creating new relations between certain Courts in cases which are defined, and they are as distinct from rules of practice as international law is distinct from municipal.

On reading the rules in question which profess to have been made under the authority of the 26th section no one using the common language of lawyers would call them provisions relating to the practice of the Court of Exchequer on the Revenue side. For the third rule is that the Court of Error, the Exchequer Chamber, and the House of Lords shall be courts of appeal for this purpose; that is, for the purpose of the appeal given by the first and second rules;—and the sixth, seventh, eighth, and ninth rules prescribe the duty and define the authority of these Courts of Appeal. These rules are so many legislative enactments purporting to create a new jurisdiction in the Court of Exchequer Chamber and House of Lords, and prescribing the mode in which such new jurisdiction shall be exercised. It is simply an incorrect use of language to call such enactments provisions respecting the process, practice, or mode of pleading in the Court of Exchequer; but, unless they can be properly and strictly so denominated, there is not in my opinion any authority to make such rules conferred by the 26th section of the Queen's Remembrancer's Act.

The principal argument of the Attorney General was, that the words "process, practice, and mode of pleading" were equivalent to the word "procedure," and that the word "procedure" denotes the whole course of a cause, from its commencement in the Court of first instance until its final adjudication in the ultimate Court of appeal, and he then contends that a provision giving a new right of appeal may be properly termed a provision relating to the procedure of a cause. I cannot accept either of these two positions. The words "process, practice, and mode of pleading" are not used in the abstract, but always with reference to some Court or Courts, and so used they have a well understood and definite meaning. They are used in the 26th section in connection with the Plea side and Revenue side of the Court of Exchequer, and properly denote the proceedings in a cause on either side within the walls of that tribunal. They have no extra territorial operation; but if they received the larger construction of the Attorney General it would follow that under the 26th section the Barons of the Exchequer would have power to make rules as to procedure in the House of Lords, which would be absurd.

It was also urged by the Attorney General that the proceeding to error is now made a step in the cause, that is, a step in procedure, and if procedure be, as he contends, equivalent to process, practice, and mode of pleading, it is a step within the meaning of those words. The fallacy of this ingenious verbal argument lies, as I have already observed, in taking the word

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"procedure" in the abstract, and substituting it for "process, practice, and mode of pleading," also taken abstractedly; that is, taken in a sense and manner in which they are never found in the Acts in question. The words "step in the cause" are used, as is well known, for the purpose of denoting that in future it should not be necessary to sue out a new writ for the purpose of entering a Court of Error.

But it has been further contended that inasmuch as by the 20th section of the Queen's Remembrancer's Act the proceeding by bill of exception is extended to the Revenue side, by which any error or omission in the ruling of a Judge at the trial may be brought before a Court of Error, the giving of an appeal from the judgment of the Court in Banc on the same question of error in the ruling is no more than a regulation of form, and not the introduction of a new right of appeal.

But the observation is not correct in point of fact, for the bill of exceptions is to the ruling of the Judge at the trial; whereas the appeal created by the 35th section of the Act of 1854 is from a different judgment, viz., the decision of the Court in Banco. But the answer to the whole of this argument is, that although the bill of exceptions was a well-known proceeding in the Courts, except on the Revenue side of the Exchequer, anterior to the year 1854, yet the legislature deemed it necessary to create the new rights of appeal which are given by the 34th and 35th sections of the Act of 1854 by express enactments for the purpose. This argument, therefore, by bringing into immediate contrast the express mention of the proceeding by bill of exceptions, with the total silence of the legislature as to the appeals given by the 34th and 35th sections of the Act of 1854, serves to confirm the conclusion, that the legislature deliberately abstained from extending to suits on the Revenue side the provisions contained in those sections.

It was strongly contended by the Respondents, that even if the Barons of the Exchequer had power to make the rules in question, they had no power to make them apply to pending proceedings, and that the attempt to do so was unjust.

This argument is not in my opinion well founded. Many of the enactments contained in the Queen's Remembrancer's Act are so worded as to be applicable at once to pending proceedings. If, therefore, these rules are warranted by that statute, there can be no injustice in making them apply to pending proceedings so long as they apply equally and impartially to both sides.

Still it is a subject of deep regret that any rules should have been made expressly with a view to the determination of a particular cause. Four years had elapsed since the passing of the Queen's Remembrancer's Act, and the necessity of these rules had never occurred to the Barons of the Court of Exchequer. On the eve of the argument of the motion for a new trial in this important case the rules in question were made without the time necessary for due deliberation. The result is, that the efforts made to settle a question of the gravest importance, and

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most essential for the guidance of the government of the country, and regarded with great expectation, have been rendered abortive, or, rather, to speak more correctly, the *mons parturiens* of this great cause, raised with so much labour and expense, will produce nothing but the ridiculous issue of some discordant opinions on the meaning of the word "practice."

I therefore have to move your Lordships that the appeal of the Crown be dismissed, with costs.

Lord Cranworth.

Lord Cranworth.—My Lords, on the argument of this case at your Lordships bar two questions were raised; first, had the Court of Exchequer the power to make the rules in question? secondly, if they had, could they make them so as to operate on a Defendant who had already obtained a verdict?

The first question depends entirely on the 26th section of the 22nd and 23rd Victoria, chapter 21. That section contains two members. I do not consider it necessary to discuss what rights the Court had under the first, but by the second part of the clause the Chief Baron and two or more Barons are authorized from time to time, by any rule or order, to extend any of the provisions of the Acts of 1852 and 1854 to the Revenue side of the Court, as might seem to them expedient for making the practice on the Revenue side of the Court as nearly as might be uniform with the practice on the Plea side.

By the second of the rules of the 4th of November 1854 it was provided (amongst other things) that in all cases of motions for a new trial, upon the ground of misdirection by the Judge at the trial, if a rule to show cause be granted, but afterwards discharged, then the party decided against may appeal, if there is a difference of opinion among the Judges, or if the Court gives leave to appeal.

There is a provision in the Act of 1854, section 35, giving to the suitor this power of appeal in such motions on the Plea side of the Court. Therefore, looking only to the words of the statute, the rule was certainly authorized, if it would tend to make the practice on the Revenue side of the Court more nearly uniform with that on the plea side.

Did then the alteration thus introduced by the second rule tend to make more uniform the practice on the two sides of the Court? I cannot doubt that it did. If by the word "practice," as used in the statute, we are to understand the whole course of procedure from the commencement of a suit to its close by final judgment and execution, there can be no doubt that under the rule in question the practice on the Revenue side was made more uniform with that on the Plea side. In fact, the practice so understood was made the same on both sides of the Court. I strongly incline to think that in construing a remedial Act like that now under consideration, we may fairly adopt this liberal interpretation of the word "practice." When the legislature sanctions the doing of certain acts for the purpose of making the practice on the Revenue side of the Court more uniform with

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that on the Plea side, it is not unreasonable to understand it as meaning the practice in Revenue causes, that is, the practice in every stage of their progress from the commencement to the end. But in my view of the case it is not necessary that I should rely on this more extended sense of the word "practice," for, even supposing the "practice" referred to in the statute to be confined to that in the Court of Exchequer itself, and to have no reference to the mode in which the cause is to be dealt with after it has left that Court, still I think the rule in question tended to make more uniform the practice on the two sides of the Court. I must here remark, that the power conferred by the 26th section is not a power, as was assumed at times in the arguments, to introduce clauses relating to process, practice, or pleading, but a power to introduce any sections which may tend to make the process, practice, and pleading on the two sides of the Court more uniform.

On the Plea side, a suitor has two modes of bringing any misdirection of the Judge at the trial under the review of the Courts of Error. He may tender a bill of exceptions at the trial before the jury have delivered their verdict, and then by proceeding in error bring the question as to the ruling of the Judge before the successive Courts of Error; or, after verdict, he may move the Court of Exchequer for a new trial, and if dissatisfied with the judgment there given he may appeal. Whichever course is taken, the question whether the Judge has ruled according to law may be subjected to the review of the Exchequer Chamber, and afterwards of the House of Lords.

On the Revenue side of the Court only one of these courses was, before the promulgation of the rules, open either to the Crown or to the defendant. Either party might tender a bill of exceptions, and so bring the matter before the Courts of Error. But if, instead of taking that course, he preferred to move the Court of Exchequer, after verdict, for a new trial, there was then no mode of questioning in the Courts of Error the ruling of the Judge at the trial.

The effect of the new rules of Court is, to enable the party, whether the Crown or a subject, dissatisfied with the judgment of the Court of Exchequer on such a motion, to appeal to the Courts of Error, thus making the mode of bringing before the Courts of Error the question whether the ruling of the Judge at the trial was correct the same on the two sides of the Court.

This may surely be treated as an alteration of practice in the Court itself. There are two passages to the Courts of Error, by either of which a suitor on the Plea side may bring under the review of those Courts an alleged misdirection of the Judge at the trial; the one notoriously inconvenient and hazardous; the other, easy and safe. Before the promulgation of the rules, a suitor on the Revenue side could only proceed by the former course. Under the rule in question the latter course is opened to him as to the suitor on the Plea side. I think this must be deemed to make the practice more uniform on the two sides of the Court itself.

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If I am wrong in coming to this conclusion, then I should not think that the rule in question was warranted; for, as I construe the statute, there was no power given to the Judges of the Court to extend any of the provisions of the two former Acts to the Revenue side of the Court, unless by so doing they would make the process, practice, or mode of pleading on the two sides of the Court more nearly uniform. The construction of the 26th section of the statute seems to me to require that the words at the end of it, which indicate the purpose for which the rules might be made, should be read as applying as well to the power of extending the provisions of the former Acts to the Revenue side of the Court as to the power of so extending the rules of pleading and practice on the Plea side of the Court. In the further observations, therefore, which I am about to make, I must assume that the rules in question did tend to make the practice on the two sides of the Court more nearly uniform.

But even supposing that to be so, still it was said there are considerations which ought to satisfy your Lordships that no power of making such rules was intended to be conferred on the Judges; first, because it is absurd to suppose that it could have been intended to delegate to the Judges of a Court the power of saying that any decision of theirs should be capable of being brought for review before the Exchequer Chamber, and ultimately to this House; and, secondly, because there are clauses in the Act itself inconsistent with the hypothesis that any such power was in fact conferred.

On the first ground, I am far from disputing that cases may be suggested in which a strict adherence to the language of a statute whereby powers are conferred on a Court or other body would lead to consequences so absurd or inconvenient as to make it necessary to understand the legislature as having used the words in question not in their ordinary sense; but I cannot discover any such necessity here. Suppose the clause authorizing the application of any of the provisions of the former Acts to the Revenue side of the Court had in terms included those provisions which related to appeals. What would there have been absurd or inconvenient in such an enactment? It might have been unusual, but that would have been all; and I know of no principle which justifies us in departing from the ordinary interpretation of words, merely because they confer unusual powers. I incline to think that I should have taken this view of the case, even if there had been no power of bringing under review the ruling of the Judge; but here the very question, as to which a right of appeal to the Courts of Error is given by the rule now under consideration, might have been brought by bill of exceptions under review of the same Courts.

Consider the question, first, when the decision of the Court of Exchequer is conformable to the ruling of the Judge, and where, therefore, the application for a new trial is refused. In every such case the right of appeal is merely a right in the party complaining of misdirection to bring by a new and less difficult

mode before the Courts of Error the same question which he might have brought before them by a more cumbrous and complicated mode of proceeding, that is to say, a right to proceed by appeal on a case stated, so as to raise the matter in dispute, instead of by bill of exceptions. The rule in such a case is merely the extending to the Revenue side of the Court of a clause or clauses of the Act of 1854 likely to make the practice on the two sides of the Court more uniform. It gives to the suitors in causes on the Revenue side of the Court the same facilities of getting out of the Court below, and reaching the Courts of Error, which are possessed by the suitors on the Plea side. It does not give substantially any new right of appeal; for, looking to substance, not to form, the party appealing is only doing what he might have done by bill of exceptions.

The case, though equally clear, is not so simple where the Court of Exchequer decides against the ruling of the Judge, and so awards a new trial. The party dissatisfied with that decision would, independently of the rules, be compelled to go down to a new trial. The Judge presiding at that trial would as a matter of course state the law to be as it had been settled by the Court. The party dissatisfied with that decision might then object to the law so laid down, and call on the Judge to state the law to be as it had been expounded by the Judge at the former trial, and on this being refused, as it must be refused, he might tender a bill of exceptions, and so bring the question before the Courts of Error. The effect of the rule in question is to enable him to bring before the Court of Error, by appeal, the same question which he might have brought before them by bill of exceptions, after incurring the useless and expensive delay of a new trial. Whether, therefore, the Court of Exchequer may have decided against the motion for a new trial or in favour of it, the effect of the rule is to enable the suitor on the Revenue side of the Court, who considers himself aggrieved by the ruling of the Judge at the trial, to reach the Court of Error by the same easy course which is open to the suitor on the Plea side.

I am aware that the Courts of Error on an appeal have larger powers than they can exercise on a bill of exceptions. On a bill of exceptions they have only to say whether there has or has not been misdirection. If there has, the duty of the Court of Error is simply to award a *venire de novo*; if there has not, to refuse it; but on appeal to the Court of Error the Court is bound to give such judgment as the Court below ought to have given. Now on a motion for a new trial on the ground of misdirection, it is by no means necessarily the duty of the Court to grant a new trial, even where there has been misdirection. The Court may see clearly that the jury could not have been and were not misled, and then a new trial may be justly refused. Or the Court may see that it ought only to be granted on terms, as, for instance, if a material witness has died since the trial, the Court may refuse a new trial, unless the complaining party consents to allow the evidence of the deceased witness on the

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former to be read on the new trial; and many other instances might be adduced. All these circumstances are to be considered by the Court of Error on an appeal, which would be out of place on a bill of exceptions. But it surely cannot be an argument against the power to make the rule now complained of, that it enables more substantial justice to be done when the case is before the Court of Error than could have been done independently of the rule.

On these grounds, I have come to the conclusion, that even if the power to grant a right to appeal, where no means previously existed of bringing the matter complained of before the Courts of Error, would be so unsual and strange that language apparently conferring it must be construed otherwise than according to its ordinary meaning, still here there not only is no such anomaly, but the power conferred is in fact only a power enabling the Court to authorize its suitors to obtain the judgment of the Courts of Error more simply, more expeditiously, more cheaply, and more effectually than they could have done under a more complicated course of proceeding.

It was, however, argued for the Respondents, secondly, that there is evidence deducible from other clauses of the statute, showing that it was not intended to confer on the Judges of the Court of Exchequer the power to make such rules as those now under consideration. This argument rested mainly on the fact, first, that a right of tendering a bill of exceptions is given, but without any power of appeal; and, secondly, that a right of appeal is given by different sections of the Act from the decision of the Court of Exchequer in some other cases, and the inference, it was said, is, that where a right of appeal was intended it was given expressly; and so that it would be unreasonable to suppose that the Legislature meant to delegate to the Court the right of declaring whether there should or should not be a right of appeal in cases where no such right is conferred by the Act.

In order to estimate the force of this argument, we must assume that but for the other clauses of the Act relied on there was authority given by the 26th section to make the rules in question. If that is so, then the question is whether the other sections relied on make it plain that the power conferred by the 26th section did not extend to cases to which but for those sections it would have been applicable; in other words, that the 26th section must be read as if there were in it a proviso declaring that nothing therein contained should be deemed to enable the Chief Baron and two Barons to make any rule empowering any suitor on the Revenue side to bring before the Courts of Error any question as to (*inter alia*) the ruling of a Judge at Nisi Prius otherwise than by a bill of exceptions. Unless the effect of the clauses relied on can be carried to that extent, they do not sustain the argument of the Respondents. I cannot attribute to them any such effect. The clause giving the right to tender a bill of exceptions was clearly necessary, for there could have been no right under the 26th section to extend to the

Revenue side of the Court the provisions of the statute of Westminster. So as to the right of appeal given in cases of summary proceedings under the Legacy Duty and Succession Acts. They were wholly out of the purview of the Common Law Procedure Acts. The only clause really raising any question on this part of the argument is the 10th, which is taken partly from the Act of 1852 and partly from that of 1854. Mr. Justice Willes considers that the general powers conferred by the 26th section of the Act of the 22nd and 23rd Victoria, chapter 21, would not extend to the case contemplated by the 10th section of the same Act, or at all events that it is very doubtful whether they would; and he gives his reasons for that opinion. I am far from saying that he is wrong in the view which he has thus taken. But even if he is, all that can be said is that there is one case which has been specially provided for by the Legislature, for which, if it had not been provided for, the Judges might under their general powers have made adequate provision. I do not feel called on to find reasons why this distinction was made. Perhaps it was thought so important to enable parties to obtain the judgment of the Court without the expense of a suit as to make it expedient to introduce this 10th section, formed by uniting together the 46th section of the Act of 1852 and the 32nd section of 1854. Be that as it may, I cannot attribute to the circumstance that express provision is made for giving an appeal in one particular case so much weight as to collect from it that the words of the 26th section which purport to give a general power embracing that case could not have been meant to have the operation which they would have had if the special enactment had not existed.

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On these grounds I have come to the conclusion that the rule giving a right of appeal from a decision of the Court, whether granting or refusing a new trial on the ground of misdirection, was warranted by the 26th section, as being a rule tending to make the practice on the two sides of the Court uniform; that there is no absurdity or inconvenience in construing the words of the Act according to their literal import; that, so construed, they conferred on the Judges of the Court of Exchequer the power to make the rule, authorizing an appeal when the Court refused or granted a new trial applied for on the ground of misdirection, and that there is nothing in the other clauses of the Act showing that no such power was intended to be given.

If your Lordships decide in conformity with the opinion which has been expressed by my noble and learned friend the Lord Chancellor on the question of the construction of the 26th section, the second point made at the bar as to the retrospective effect of the rules does not arise. But should it become necessary to decide it, I think the answer given at the bar is satisfactory.

The authorities show that when new arrangements come into force for regulating procedure they operate on pending as well as future suits. Where this principle has been acted on, as it has often been acted on, with reference to costs, I cannot quite reconcile my mind to what has been done.

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Here, however, the *nova constitutio* was merely a regulation calculated or supposed to be calculated to make more sure the ultimate attainment of justice. It operated equally on both parties, and according to all the authorities affected existing as well as future suits.

In this branch of the question the right to make the rules prospectively must be assumed. And it is considered that when a suitor comes before the Court he does so merely to obtain his right, whatever that right may be. He is not allowed to complain of any rules or orders lawfully made by the Court for the better attainment of justice, merely because they have been made after he has placed himself within its jurisdiction.

On these grounds I think that the Court of Exchequer Chamber ought to have entertained jurisdiction.

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Lord St. Leonards.—My Lords, upon this case I have certainly formed a very decided opinion, and I regret to be able to say so, from the respect which I feel for the learned Judges out of this House, and for some of my noble and learned friends in this House, who entertain a different opinion, and that ought to make me rather more doubtful still than I am of any opinion which I may entertain; but that I do entertain a very decided opinion it is my duty to state to the House, when I am called upon to give an opinion for the assistance of the House.

My Lords, I propose in the first place to ascertain what the true construction of the Act is, standing alone. Let us suppose that the Court of Appeal had never arisen, and consider what is the construction of the Queen's Remembrancer's Act, and how the provisions of that Act are worded, and for that purpose I must call your Lordships' attention very shortly to the provisions of the Act.

I assume, first, that the question of appeal had not given birth to the orders, then would the Act of 1859, by its own force, have executed its own declared intention? The framers of that Act had before them the two Common Law Procedure Acts of 1852 and 1854, and other Acts bearing upon the object in view. And from these they collected and adopted such of their provisions as they thought could be properly applied to the Revenue side of the Court of Exchequer. For we must not lose sight of the peculiar duties and jurisdiction of that branch of the Court, and the care which the Court and the Crown lawyers would naturally take to prevent any alteration in the jurisdiction which was likely to affect the power of the Court or the interests of the Crown. It is precisely the case in which we should expect to find the intention carried into operation, through the aid of Parliament, to be expressed in clear language, and nothing left to inference or implication.

I may premise that, as far as intention is expressed, nothing can be more clear. Whether the matter in dispute is left to implication, or is amongst the things expressed, I shall presently

consider. The Act is, as we should expect to find it, technically drawn, and we are bound to construe it accordingly.

The object of the Act was to simplify the proceedings on the Revenue side of the Court, to define the rights of appeal intended to be given, and to give rights of appeal to subjects newly created; for example, Succession Duty and Legacy Duty.

The first section which is material to our purpose adopts section 222 of the Common Law Procedure Act of 1852, for the amendment of errors. The next provides for proceeding on a special case by consent of parties and order of a Judge, upon which error may be brought, as if on a judgment on a special verdict. This section is compounded of section 46 of the Common Law Procedure Act of 1852 and section 32 of the Common Law Procedure Act of 1854; and the succeeding section simply provides for costs.

By the four succeeding sections a new right of appeal is expressly created from the Court of Exchequer under the Succession Duty Act. They direct how the Court of Appeal is to act, and they direct that such appeal shall be made to the Court of Error in the Exchequer Chamber, whose decision shall be subject to appeal to this House; and also a right of appeal is given in summary proceedings for succession or legacy duty.

Observe how well and clearly the Act executes its own object! When it means an appeal it expressly says so, or as clearly uses words equivalent to it.

The next section extends to this Act of 1859 the provisions of an Act of William the Fourth, for the examination, &c. of witnesses, and once more selects four sections from the Common Law Procedure Act of 1852, which relate to the proceedings and powers of Courts of Error.

Recourse is then had to a previous statute of the 2d and 3d Victoria, chapter 22; and, adopting that Act, it enables a Judge at Nisi Prius to hear a Revenue cause without any commission from the Revenue side of the Court.

The Act once more adopts three sections, sections 17, 18, and 19, of the Common Law Procedure Act of 1852, limiting the period within which error may be brought, and abolishing writs of error; and it carefully provides against the retrospective action of the latter provision, and gives, where it intended to do so, power to the Barons to make certain orders as to bail. It was necessary to do so—and was done.

It still remained to secure a general right of appeal on the trial of issues arising on the Revenue side of the Court, and this was expressly accomplished by enacting that either party may tender a bill of exceptions. This is an original provision, and thus an old right was introduced for the first time on the Revenue side of the Court of Exchequer.

This then left the Act complete as regarded substance. Every thing material, and requiring the power of Parliament, is expressly, and not by implication, provided for. Particular modes of appeal are selected and others rejected. New rights

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are created. The Act of Parliament is the Charter of the Revenue side of the Court. As regards form, section 26, which I must consider more at large by-and-by, provides power for the Barons to make rules and orders as to the process, practice, and mode of pleading.

The Act worked well. The learned Barons understood their power under section 26, according to the common meaning of the words; and they accordingly in 1860 made extensive orders (amounting to 146) for the regulation of the process, practice, and mode of pleading on the Revenue side of the Court, and more especially with regard to proceedings in error. Several of the provisions of the Act of 1852 were adopted, so far as they were applicable. And in 1861 the Barons issued some further orders for similar objects. But no attempt was made to create any new right of appeal, or to incorporate the appeal clauses now before your Lordships.

In 1860 (the year after the Queen's Remembrancer's Act was passed) another Act was passed, once more to amend the process, practice, and mode of pleading in the Court, and for enlarging its jurisdiction; but no provision was made with regard to appeals from the Revenue side of the Court of Exchequer. Two trifling powers, theretofore confined to Courts of Equity, were extended to the Common Law Courts; and under the head of "appeal" express provisions in eight sections were made in regard to the rights of appeal from the new jurisdiction. Therefore what Parliament intended they carefully performed.

It would be worth your Lordships while to look at the Act of Parliament. There are three small sections giving new powers; and then there is in the body of the Act itself the head of "appeal," with eight sections under thai head, all of them expressly providing for rights of appeal in the most explicit terms. Parliament, therefore, as in the preceding Act to that, namely, the Queen's Remembrancer's Act of 1859, did not deal ambiguously in creating appeal, but they dealt expressly, like men of business competent to perform the acts of legislation which they were called upon to perform, and they told you plainly that which they intended to enact.

My Lords, if we confine the Act to what it clearly expresses, we shall give full effect to every clause and every word in every clause according to their ordinary import. The 26th section admits of an easy construction, reading it by the light of the general provisions of the Act; and thus it was construed by the Court of Exchequer up to last November.

But at that period the Crown in this case had lost or abandoned its right by bill of exceptions, and its only remedy against the verdict of the jury in favour of the defendants was to move for a new trial in the Court of Exchequer; and it was at once seen, that as the Act of 1859 stood there would be no right of appeal on the part of the Crown if the Court of Exchequer should refuse to disturb the verdict, and therefore, to provide a right of appeal, the Barons by their orders of the 4th

of November last applied to the Revenue side of the Exchequer all the provisions in regard to the right of appealing in the Common Law Procedure Act of 1854, sections 34 to 45, and directed them to have immediate operation, and to apply to every proceeding then pending. This was done to supply the right of which the Crown stood in need, and it has accomplished its purpose, if the orders were authorized by the 26th section.

My Lords, I say, and I repeat it, if the orders were authorized by the 26th section, that is the question. Now, my Lords, that section provides in these terms, that "It shall be "lawful for the Lord Chief Baron and two or more Barons of "the Court of Exchequer from time to time to make all such "rules and orders as to the process, practice, and mode of "pleading on the Revenue side of the Court, and as to the "allowance of costs, and for the effectual execution of this Act, "and the intention and objects thereof, as may seem to them "necessary and proper, and also from time to time by any such "rule or order to extend, apply, or adapt any of the provisions "of the 'Common Law Procedure Act, 1852,' and the 'Common "Law Procedure Act, 1854,' and any of the rules of pleading "and practice on the Plea side of the said Court, to the Revenue "side of the said Court, as may seem to them expedient for "making the process, practice, and mode of pleading on the "Revenue side of the said Court as nearly as may be uniform "with the process, practice, and mode of pleading on the Plea "side of such Court."

Now it is clearly laid down that no right of appeal can be given except by express words. This I know will be questioned by my noble and learned friend opposite; but he will admit that no such right can arise by implication or inference, nor indeed does the Crown deny that express words are required, inasmuch as the Attorney General relies upon the words "process, practice, "and mode of pleading" in the second part of section 26; but undoubtedly he was driven to much pleading to make these words authorize the creation of new rights of appeal.

What is the power claimed? That of creating new rights of appeal. Did Parliament intend to delegate this, its own great power, without any check or control, to the very Judge whose decision is to be the subject of appeal? It is difficult to come to that conclusion. Every line of the Act negatives such a presumption. Observe how carefully it provides for new rights of appeal where it did create them, and how laboriously it selected from the legislative provisions before it those which would accomplish its object; and how, with equal care, it excluded what it did not adopt. It did not leave either the Crown or the suitor without a remedy—an equal remedy. The very twelve appeal clauses enacted by the Barons were under the eyes of Parliament when the Act passed; they are sections 34 to 45 of the Common Law Procedure Act of 1854. Observe section 32 of the Act of 1854, immediately preceding those adopted and enacted as law by the Barons of the Exchequer, is selected and adopted and included

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in section 10 of the Act of 1859. And, still more remarkably, sections 36 and 37 of the Act of 1854 are also properly selected and adopted in sections 13 and 14 of the Act of 1859. These two last-mentioned sections, 36 and 37, are amongst the orders too of the Court of Exchequer. And section 36 is probably not adapted to the Act of 1854, for that section was in the Act itself. Why did Parliament so carefully and so openly reject the others of this set of clauses in the Act of 1854? for they formed one class. Can it be argued, from inference or from implication, that where Parliament have not imported the whole set unbroken and entire, but have picked out one here and another there, leaving all the others out, Parliament intended that the Barons of the Exchequer should, whenever they thought proper, take all or any of the clauses which had been thus carefully excluded and eliminated from the mass? How is it possible that such an argument can be maintained? Provision was made for all the modes of appeal which Parliament intended to grant between the Crown and the subject, and that was the reason why they selected them.

If the alleged power was really created it might have been exercised the day after the Act itself had received the royal assent. Would not this have been a surprise upon Parliament? Supposing the Court of Exchequer, when the Act of Parliament was quite fresh, the next day after it had received the royal assent, had said, This is a bungling act of legislation, but happily it enables us to supply what we think proper. We will take all those clauses and make them law which Parliament, in its ignorance, not knowing how to adapt those things, has excluded, and then we will make a perfect Act of Parliament. Parliament would have been rather astonished. But that would have been no greater exercise of the power, and there would have been nothing more extraordinary than now exists in the exercise of that power, at the moment in which the particular clauses were intended or required for a particular object. The very action under the authority claimed shows how great and dangerous is the power which Parliament is supposed to have delegated. If Parliament had itself thought proper to give to the Revenue side of the Court of Exchequer the additional rights of appeal claimed to be created by the Barons, in addition to those expressly provided by the Act, look at the deliberations, the three readings, and committees, &c. in both Houses, and the royal assent, and the time for consideration; whereas under the delegated power a transcript from the Act of 1854, signed in chambers by the Court of Exchequer, operated at once as an Act of Parliament. I say at once, because such is the express provision in the orders. I may perhaps venture to say that no such provision would have been made by Parliament *pendente lite.*

It is said that the order operated for the equal benefit of the subject and of the Crown. This, I think, has not been established. It was foreseen that in the event of the Court of

Exchequer refusing the motion for a new trial the Crown would be estopped from further proceeding unless a new right of appeal were created.

The orders if valid gave that right, in the event which has happened, to the Crown, at the expense of the defendant, who would have to follow the Crown in its appeal to a higher tribunal, in order, if they could, to maintain the verdict of the jury in their favour. Now, if the orders were invalid, the parties would seem to stand thus:—The Crown would be absolutely defeated, if the new trial was refused, and the defendants would be successful. But suppose a new trial to be ordered, the defendants would not have been defeated, but the litigation would proceed, and in the result the defendants might be able to appeal to the highest tribunal. A judgment against the Crown would be final, but a judgment against the defendants would not.

It appears to me, therefore, subject to correction, that the Crown obtains under the orders, if they are valid, an advantage over the subject. Indeed, although this may not be so, or the consequences may not have been foreseen, the orders were issued to meet the difficulty which the Crown had to surmount. That the Barons of the Exchequer, for whom I entertain the highest respect, acted with the purest intentions, no one can doubt; but the *ex post facto* operation of the orders, if valid, would of itself have led me to the conclusion that Parliament had not given, nor shown any intention to give, a power of such an objectionable nature. This very exercise of the power to that extent appears to me to show conclusively that no such power thus attempted to be exercised could have fallen within the intention of the Legislature.

It was argued that the Barons of the Exchequer had full power over the appeal. This, however, could give them no power to create new rights of appeal.

It was then urged that no new ground of appeal had been created; that, as the Act of 1859 allows a bill of exceptions, it can, like the new order, only be for misdirection; that a bill of exceptions is full of difficulty, but that both being for the same cause there is no new ground of appeal. This no doubt is so; but the answer appears to me to be, that a new right of appeal is given, and that Parliament, having had its choice of remedies, selected that of a bill of exceptions in clear terms, thus, by the simplest construction, excluding other remedies; whereas the orders add these excluded remedies for the same object, thus acting under an alleged delegation of legislative power in direct opposition to the authority of Parliament.

My Lords, I would compare the Act as it stands to a manufactory, carefully constructed, and fitted by scientific men with machinery, admirably adapted to its particular objects. It is still perfect in all its parts. It can execute all that it was intended to perform, if you will but let it alone. Send a skilled workman, and he will at once know how to adapt the proper portion of the machinery to the work which he requires. An

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unskilled workman could not overlook the power of the machinery, but he would complain that there were simpler mechanical plans known, and with great simplicity he would ask that they might be added to the fixed machinery. No, says the manufacturer, my works are open to all men, but my machinery was selected as best adapted to the objects I had in view. I had before me the simpler schemes which you mention, and I deliberately rejected them, but still provided ample machinery to suit even your purpose. Ask me not, therefore, to clog my work by the additions which you propose. They would introduce new forces which I do not require, and would greatly interfere with the action of my present works. If you come to my manufactory you must use my machinery.

My Lords, upon these broad general views I should have been prepared to give my opinion against the orders in question; but after the opinions which have been delivered, and the arguments which have been addressed to the House, it is no doubt proper to review the special grounds upon which the Barons of the Exchequer claim to exercise legislative delegated authority to create a new right of appeal.

Now I agree that to create such a right it is not necessary to use the word "appeal;" but some clear equivalent terms must be used. And if this be the rule where Parliament is executing its own purpose, how powerfully must it operate where it is delegating its legislative functions! We have a right to expect a clear and unambiguous expression of its intention; open to no doubt or cavil; nothing left to inference or implication. How slight is the duty just simply to say that the authority given to the Barons shall extend to the other various rights of appeal contained in the Common Law Procedure Act of 1854, from which Parliament had already adopted such of the remedies as they thought it fit to apply to the Revenue side of the Court of Exchequer. And if this precision might be expected in any common case, here we might be assured it would not be omitted. What, would Parliament leave its intention on such a vital point open to so much ambiguity as to require arguments occupying several days to establish the true construction of the delegated power, and to lead to divided opinions amongst our learned Judges? And yet this is the very Act of Parliament in which new powers of appeal on the Revenue side of the Exchequer were expressly created by that word; in which indeed the terms "appeal" and "appealing" meet the eye all through the Act in its actual provisions. If the delegated power be given to the Exchequer, how remarkable it is that Parliament, having expressly created rights of appeal where such was their intention, should suddenly have altered their language, and used ambiguous terms, with the intention, not only to delegate like powers to the Barons of the Exchequer, but powers actually enabling them to create the very rights which Parliament itself had rejected. Parliament said, that the litigating parties, except in certain cases otherwise provided for, should proceed by bill of exceptions.

The Barons of the Court of Exchequer say, You shall have, in addition to those rights, others which Parliament have withheld from you.

My Lords, these views would lead us to examine with much care the delegated powers given to the Court of Exchequer; and I must therefore once more trouble your Lordships with reading section 26, before I proceed to a minute examination of those powers. "It shall be lawful for the Lord Chief Baron and two "or more Barons of the Court of Exchequer from time to time to "make all such rules and orders as to the process, practice, and "mode of pleading on the Revenue side of the Court, and as to "the allowance of costs, and for the effectual execution of this Act, "and the intention and objects thereof, as may seem to them "necessary and proper; and also from time to time by any such "rule or order to extend, apply, or adapt any of the provisions of "the 'Common Law Procedure Act, 1852,' and the 'Common Law "Procedure Act, 1854,' and any of the rules of pleading and "practice on the Plea side of the said Court, to the Revenue side "of the said Court, as may seem to them expedient for making "the process, practice, and mode of pleading on the Revenue side "of the said Court as nearly as may be uniform with the process, "practice, and mode of pleading on the Plea side of such Court." And section 27 empowers the Court of Exchequer to issue new forms of writs and proceedings.

Now section 26, although consisting of two parts, forms only one law, having the same object. The first portion authorizes the Barons generally, from time to time, from any source, to make such rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer, &c., and for the effectual execution of the Act, and the intention and objects thereof, as may seem to them necessary and proper. Now, to stop here for a moment, it is admitted by the learned Attorney General that under this authority the Barons of the Exchequer could not have supplied the bill of exceptions if section 20 had not granted it; and it could not have been supplied by the second part of the clause, which I am about to read, because no such provision is in the Common Law Procedure Act. And further, it was admitted that under this authority the appeal clauses in question could not have been created. But, to proceed, the second portion of section 26 adds, "and also from time "to time by any such rule or order to extend, apply, or adapt "any of the provisions of the 'Common Law Procedure Act, "1852,' and the 'Common Law Procedure Act, 1854,' and any "of the rules of pleading and practice on the Plea side of the "Court, to the Revenue side of the Court, as may seem to them "expedient for making the process, practice, and mode of plead-"ing on the Revenue side of the Court as nearly as may be "uniform with the process, practice, and mode of pleading on "the Plea side of the Court."

It appears to me clearly that the whole of this second portion of the section is governed by the concluding words. The first

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portion speaks generally of the process, practice, and mode of pleading; whereas, although the second portion first authorizes generally the application of any of the provisions of the Common Law Procedure Act, it proceeds to say, "and any of the rules of "pleading and practice" (omitting "process") "on the Plea "side of the Court," and then winds up, as we have seen, by declaring the object to be to make the process (here that word is introduced), practice, and mode of pleading as nearly as may be uniform on both sides of the Court. So that the first part of the second portion of the section would extend to *process*, and the latter part to *practice and pleading*. And in that way the concluding words clearly control, direct, and explain the whole of section 26.

It seems difficult to admit that these powers would not have enabled the Barons to create a right to a bill of exceptions on the Revenue side, and at the same time to hold that the right to a bill of exceptions, actually created by the statute, could, under the power in section 26, have attached to it (or indeed, in substitution for it,) other and easier modes of appeal to the higher Courts. It would be found difficult to give a different construction to the words "process, practice, and mode "of pleading" in the first and in the second portions of section 26. I must say, that after all that I have heard, and after the great attention which I have paid to this case, I am quite unable to understand the ground upon which it was possible to maintain a solid argument that in the one part of the section the words are to be read in one sense and in another part they are to be read in a different and in an opposite sense.

The section itself is so framed as to exclude the construction contended for. The words "from time to time," carefully repeated, seem to point at such power as would not only from time to time be granted, but could also be repealed or altered; in short, confined to process, practice, and pleading, in the ordinary sense of those terms. No doubt the Barons of the Exchequer could deal with existing appeals under the Act, but they could not create any new right of appeal.

It is remarkable that section 26 gives this legislative power, as claimed, to the Lord Chief Baron and two or more Barons of the Exchequer, so that the concurrence of all the Barons was not required. And yet in the next section, which is for mere matter of form, the authority is confined to the Lord Chief Baron and Barons. Parliament does not seem to have attached much importance to the delegated power. If it was the intention of parliament, divesting itself of a power which it ought never to part with, to delegate to any other person out of Parliament legislative power—power to enact new laws and create new rights of appeal, thereby conferring the greatest power which Parliament could confer upon a Court—if, I say, such could have been the grave intention of Parliament, stripping itself as it ought not to to have done for any reason of a power which it declined to exercise itself, and which it never intended to exercise, would it

have left to a mere majority of the Court of Exchequer that great power, whereas when it came to a question of form immediately succeeding the special great power, it requires all the Court to concur? Where is the construction which possibly could lead your Lordships to take such a view of such a clause as that which we are now considering?

I cannot think the saving clause at the end of the Act unimportant. It declares that nothing in the Act contained shall affect or prejudice the jurisdiction or authority of the Court of Exchequer, &c. Now the making of orders giving a right of appeal from the Court of Exchequer where such right of appeal did not before exist, is an act by the present barons of the Court of Exchequer, which does, if valid, affect and prejudice the jurisdiction and authority of the Court in all time to come. The present Barons exercising this power have superadded what did not before exist, namely a right of appeal in various modes from the decision of the Court of Exchequer, leaving out therefore, not with the authority in those respects which it had within its own Court, the same power which this House possesses, that is to say, the power of deciding without any appeal beyond from its decision. The Court of Exchequer having a right to decide without any power of appeal, the present Barons of the Exchequer have, in the exercise of this supposed power, given the right of appeal from their decision, and have therefore made their judgments subject to the decision of a higher tribunal. If that is not affecting their jurisdiction, I cannot imagine what can be said to be so.

My Lords, I have by anticipation shown that my opinion is that the words "process, practice, and pleading" cannot bear the construction put upon them by the Attorney General. I think that they must be received in their common acceptation. Several of the sections in the Act of 1859 appear to me to show that Parliament used the terms in that restricted sense.

I will ask your Lordships to observe that section 22 and those clauses which I am now referring to, are not printed in the joint Appendix; they do not appear to have struck anybody in the way in which they strike me at present. Section 22 makes good defects in pleading on the Revenue side of the Court of Exchequer. Section 23 relates to process for levying of fines, &c. Section 24 directs execution to issue to recover certain debts according to the rules and practice of the Court. And those terms are all repeated in section 26, which is separated from the others only by one clause creating a new right in the Crown. It is remarkable, therefore, that in the very Act which contains section 26, which speaks of "process, practice, and pleading," in three of the sections immediately preceding the 26th, one gives you an instance and a rule in regard to process, another gives you an instance and a rule in regard to pleading, and another gives you an instance and a rule in regard to practice. Well then, as Parliament had just spoken of "process, practice, and pleading," and shown their proper appli-

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cation to the proper cases—in every instance using the very terms, not in a sort of interlocutory expression, not inference, not implication, but in the very terms that we are now speaking of—speaking of process, speaking of pleading, speaking of practice—every one of those terms used, and every one of them applied distinctly and directly to its own proper object, and its own proper work—is not that a guide to section 26? When it speaks therefore, of the process, practice, and pleading of the Court, we have only to cast our eyes a few inches above, and to look at the rules above, and the very Act of Parliament tells us what Parliament itself intended by those expressions. It appears to me, I confess, with very great submission, that although no doubt the observation has not been hitherto made, it would be very difficult to answer that view of the case.

The fact that no such extended irresponsible power was ever before given by Parliament to any Judges is entitled to much weight, when we are asked to construe words into an authority to create an appeal to the Exchequer Chamber and to this House, although no such intention is expressed, and although the words which are used may well be satisfied by applying them to other and minor, yet important objects.

The more it is attempted to show that the Barons of the Exchequer have an absolute power to create new rights of appeal on the Revenue side of the Court the more I am impressed with the objection that, looking through the four corners of the Act of Parliament, not only is no such intention expressed, but the whole frame of the Act rebuts a construction which would not be subsidiary to the Act, but would run counter to its express and careful provisions.

My clear opinion therefore is, that the orders were void, and that the appeal should be dismissed with costs.

Lord Wensleydale.

Lord Wensleydale.—The question which your Lordships have now to decide is very important. I regret to find that the conclusion to which some of my noble and learned friends have arrived differs from mine, and, from the sincere respect I have for their opinion, I cannot feel so much confidence in my own. But, after having given every consideration in my power to the question, I feel bound to advise your Lordships to adopt the course which I think is just, and to reverse the decision of the Court of Exchequer Chamber.

The question, though important, really lies in the narrowest compass, and is only as to the meaning of the 26th section of the statute 21 and 22 Victoria, chapter 21, "An Act to regulate "the Office of Queen's Remembrancer," which makes it lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer, from time to time, to make rules and orders, and also from time to time, by any such rule or order, to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the rules, and pleadings, and practice on the Plea side

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of the said Court to the Revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side of the said Court.

To this section we must, I am clearly of opinion, apply the ordinary rule of construction applicable to all written instruments:—What is the true meaning of the words used, according to their usual acceptation, and their ordinary grammatical meaning? And applying that rule, I do not think there is much doubt what the meaning is. Does it authorize the Court of Exchequer to grant an appeal to the Court of Exchequer Chamber and the House of Lords, against the decision of the Court of Exchequer on the Revenue side, on a rule for a new trial on the ground of misdirection?

But, on perusing the very able opinions of some of the Judges of the Court of Queen's Bench delivered in the Exchequer Chamber, I perceive in them a suggestion of a rule of law that such power of appeal was so *unusual* that it required "a clear unambiguous expression" of the intention of the Legislature in order to support it, that the power must be "distinctly and unequivocally given;" and that supposed rule seems to me to have had great influence in forming the opinions of these Judges of the Court of Queen's Bench.

Such a rule of construction appeared to me to be entirely new, as far as my experience went, and I inquired from the learned Counsel in the course of the argument, whether any authority could be found for such a principle of construction. I was referred by Mr. Mellish to some cases on the subject of appeals from the decisions of magistrates collected in Dickinson's Sess. Cases, 6th edition, 626. These, when closely examined appear to amount to more than this, that an appeal cannot be given "by *implication*," that is, in truth, no more than that however much you may be satisfied that the Legislature must have intended to have given it, it is not enough unless there are words to give it.

I have often had occasion to mention, in the construction of written instruments, how important it was in every question of intention, to distinguish between the meaning of the words used, and what the framer of them may be supposed to have intended, and I have found that the rule has not always been attended to. In my opinion there is no legal ground for such a principle of construction as seems to have been acted upon by some of the Judges.

The true question for us to decide is,—What is the ordinary and grammatical meaning of the words used in this section? Do these words give the Chief Baron and two Barons the power of extending the right of appealing against the decision of a rule to show cause for a new trial on the ground of misdirection, to the Court of Exchequer Chamber? such a power being clearly given to the Common Law Courts by the Act of 1854.

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The first part of the 26th section gives the Judges power to make new rules and orders on the Revenue side of the Court. It is not contended that this would authorize a new rule to allow an appeal. The words of the second part, if taken by themselves, would be clearly enough to allow *all* the provisions of the Acts of 1852 and 1854 to be adapted.

Three questions then arise:—First, Is this so unreasonable that the general power is not to be so construed? for no doubt if the natural and ordinary construction of the words used would lead to an absurd or unreasonable consequence, they may be moderated or qualified or explained:

Secondly, Does the circumstance that other provisions of the statute expressly enacting that certain clauses of the Common Law Procedure Act, 1853, and the Common Law Procedure Act, 1854, should be in force and extend to the Revenue side of the Exchequer, afford a proof that *none* others were intended to be extended, applied, or applied.

And thirdly, Does the conclusion of the 26th section, explaining that the object of the enactment is that the process, practice, and mode of pleading of the Revenue side of the Court of Exchequer should be made uniform with the process, practice, and mode of pleading on the Plea side of the Court make any difference? Is the word "practice" to be understood in the larger sense of the whole conduct of the procedure in the suit in the Court of Exchequer, from the beginning of the suit to the ultimate judgment and execution, or in the more limited sense of common and ordinary practice?

These several points must be disposed of.

1st. It seems to me that it is impossible to say that the introduction of a power of appeal against a decision upon a rule nisi for a new trial for misdirection, in point of law, is an unreasonable power; on the contrary, it is a most satisfactory one. It gets rid of the difficulties and inconveniencies of a bill of exceptions, which all practitioners know to be extremely troublesome and embarrassing in its preparation and settlement, and substitutes a much more simple course for inquiry into the propriety of the Judge's ruling. I think it is wholly impossible to contend with success that the substitution of this mode of proceeding is not a very reasonable one.

Nor is there anything in the least unreasonable in delegating this power to the Judges of the Court itself. Mr. Justice Willes, in his very able judgment, has given many instances of such delegations by the Legislature to others. The Act 3d and 4th William IV. chapter 42, the first of a series of Acts by which the law has been greatly reformed and improved, gives to the Judges the whole authority to make most important changes, subject only to the condition of being laid before Parliament. The Common Law Procedure Act, 1852, gives a somewhat similar power to the Judges. So the Common Law Procedure Act, 1854. These powers were given to a quorum of eight Judges, the chiefs of the Court being three. In this case it is

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the chief of the Exchequer and two Judges who have the power delegated to them, but the delegation being perfectly reasonable there surely is not the shadow of an objection that a quorum of the Judges of the Court, who alone administer the law of the Exchequer, should have the power to make the allowed alterations in it. I think, therefore, that the power of adopting the provisions as to appeal is valid.

2nd. Does the enactment, in express terms, in the statute 22nd and 23rd Victoria, chapter 21., of certain provisions as applicable to the Revenue side of the Court of Exchequer, afford an inference that they were all that the legislature meant to be so applied, and operate as a sort of legislative declaration that no more should be so applied. I think this circumstance affords no such inference; clearly not those which are independent of the power to appeal, or to bring a writ of error. All that can be implied is, that those powers were all that the legislature then thought expedient, but they give to the Judges the power of adding, from time to time, others which they might judge proper if circumstances should render it advisable. It is confided to them to exercise that discretion fairly and properly. Had the legislature thought it right to allow no other provisions to be applied, nothing would have been more easy than to have *said* so. We cannot imply that without its being said.

These sections are the 9th, 10th, 12th, 15th, and 20th. The 9th refers to the power of amendment only, and is given to its full extent. It is of the most frequent application, and nothing is more reasonable than that the legislature should, at all events, have enacted that this useful provision should be made.

Mr. Justice Willes has assigned most satisfactory reasons why the new sections giving error or appeal were necessarily inserted. It is from those only that any inference can be drawn that the powers of error and appeal were to go no further. The 12th section, giving appeal from the assessment of the Commissioners of Inland Revenue, was absolutely necessary, because the Common Law Procedure Acts, 1852 and 1854, could not have given it. So the 15th section, giving error on a writ of summons on the Succession Duty Act, or for legacy duties. So the 20th. For a bill of exceptions in a common case was not given by the statute of 1852, but only in the newly constituted multifarious case of ejectment. It was given by the Statute of Westminster 2nd.

As to the section 10, there is great doubt also, to say the least, whether it was not necessary, for it does not give precisely the same powers to state a case as the 42nd and 46th sections of the statute of 1852, the first of which gave only a qualified power to the Judge on being satisfied that the parties have a *bonâ fide* interest in the question, which is not required in the section 10. It would not have been sufficient, therefore, to leave those 42nd and 46th sections unaltered, and section 10 effected that object. As the Attorney General in all Revenue cases is a necessary party, he is included in the term "parties," as pointed out by

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Mr. Justice Willes' judgment, and his consent to a case would supersede the judgment of a Judge as to the *bonâ fide* interest in the question. This, in my mind, is quite satisfactory; but even if it leaves it a matter of doubt, whether this power could have been given by the Acts of 1852 and 1854, it was expedient to make it perfectly clear, and to leave no question as to the right of the Attorney General, on behalf of the Crown, to the claim to have such a case stated, with the consent of the other party to the cause, and the simple order of a Judge.

On the whole, it seems to me clear that the principle of *expressio unius est exclusio alterius* cannot be held to apply.

I have come, therefore, after much consideration, to the conclusion, that the 2nd part of the 26th section authorizes the Exchequer Judges to make a rule giving an appeal in the case of a discharge of a rule nisi for a new trial.

The third question is, whether this power is qualified, so as to confine it entirely to matters of the ordinary *practice* of the Court in a limited sense.

The words of the second part go much beyond that. They authorize the Chief Baron and Barons from time to time, by any rule or order, to extend, apply, or adapt *any* of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854. This is quite independent of the clause authorizing the application of the rules of pleading and practice; but the general object is, to make the process, practice, and mode of pleading on the Revenue side of the Court, as nearly as may be, uniform with the process, practice, and mode of pleading on the Plea side of the Court.

Does that provision *limit* and *control* the power to adopt the provisions of the Acts 1852–1854, and apply to common and ordinary practice in the limited sense only? Many of those provisions in the two Acts go greatly beyond "practice," in that sense, and process and pleading also. Can it be supposed that the legislature meant to undo, by the use of that term in the concluding part, what they had given before?

I cannot but think that, to make the whole clause consistent, the word "practice" must be construed in the larger sense given to it in the Judgment of the Judges of the Court of Common Pleas, and explained more particularly by Mr. Justice Willes. It seems to be used in the same sense as it is in the preamble of the statute 1852, (which is of much more importance than the title,) and in the preamble of this Act, 22nd and 23rd Victoria, chapter 21. It is for rendering the process, practice, and mode of pleading in the Superior Courts more simple and speedy; and one purpose, *inter alia*, is to make provision in relation to the *procedure* on the Revenue side of the Court.

Nor can I see any ground to confine the enactments to one department of the Revenue side of the Court, as contended by Mr. Mellish. The words apply equally to all pleadings and proceedings in Revenue.

The abolition of the Writ of Error on the Revenue side by section 19 (giving the Barons a discretion as to bail, which would not, therefore, necessarily affect the Attorney General), and by the Act of 1852, section 148, which enacts that a Writ of Error shall not be necessary or used in the proceeding to error, but shall be a *step* in the cause, seems to me to put the Court from which the record was before removed by the writ of the Queen, entirely on a different footing. The suit is now begun and ended in the same Court. The cause is not removed. The execution issues from that Court, the Court of Error giving its assistance to come to a right final conclusion. I agree with the Judges who think that the whole proceeding, from the beginning to the end of the suits, the taking the opinion of the Court of Error as well as acting upon it, constitutes the *practice* of the Court, since the recent alteration and a different mode of taking that opinion is a part of that practice.

But a question has been presented to our attention, at the close of Sir Hugh Cairns' argument, and since fully discussed, which must be now considered. Was it competent for the Judges of the Exchequer to alter the law as to *then* pending proceedings, and to enact provisions at the time which they did, viz., on the 4th November 1863, so as to affect the verdict which the claimant then had, which was subject only to the then existing law, and make it subject to another mode of inquiry?

I was much impressed with this objection at first, and was for a time strongly inclined to think that it was well founded, and that the new rules, though operative as to all future suits, were not operative in this. But the further argument, and a full consideration of this question, have satisfied me that this objection is not well founded.

Two questions present themselves:—1st, What would have been the effect, if the Legislature had made a new Act of Parliament, containing precisely the same terms as the rules of the 4th November? Would it have affected existing suits? 2nd, If it would, ought the rules to be construed in a different way, and not allowed to have that effect?

I answer, that the new law would affect the existing suit; and the delegated authority to the Barons of the Exchequer ought to have precisely the same effect.

First, in this case it is perfectly clear that what I for the present may call the *law* of the 4th November 1863 took away no *right*. The verdict had been given for the claimant. The power of tendering a Bill of Exceptions was gone. The new law took away no right from the claimant. It gave both the claimant and the Crown precisely the same right, that of questioning the propriety of the decision of the Court of Exchequer on a rule for a new trial for misdirection. If the judgment was given for the claimant, the Crown has the right to question that by appeal. If for the Crown, he has exactly the same right. The new law is, therefore, perfectly fair to both parties.

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But, independently of that consideration, I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail.

There is no doubt of the justice of the rule laid down by Lord Coke in the 2nd Institute, 202, that enactments in a statute are generally to be construed to be prospective, and to regulate the future conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed that the Legislature meant to deprive a man of a vested right of action. This was laid down in Moon v. Dundas, in 2 Exchequer, 22.

But, on the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, when it is presumed that it is not intended to take it away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate or alter.

This has been most clearly and satisfactorily explained in the case of Wright v. Heale, 30 Law Times, Exchequer, 40, particularly by Sir James Wilde. In that case it was held, that the Common Law Procedure Act, 1860, section 34, which enacts that if a plaintiff in action for a wrong in the Superior Courts recover less than 5*l.* he shall not be entitled to costs, unless the Judge certifies that the action was brought to try a right, applies to actions tried after, but commenced *before*, the suit. Sir James Wilde says, with truth, that this does not take away any right.

The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not make the right to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure.

I am, therefore, clearly of opinion that if the provisions of the rule had been in an Act of Parliament of the same date, the Act would have affected existing suits, and would unquestionably have given an appeal in suits in which verdicts were already obtained.

Secondly, Are these rules made, not directly by Parliament, but by delegated authority, to be differently construed? I think not. Parliament has delegated the power, without restriction, to the Judges. It has made no conditions that it should operate only as to future suits; and if it was not to affect pending suits, many useful alterations might have been prevented. The period of making the allowed rules is left entirely to the Judges themselves to decide. It must be considered as unquestionable that they had a power to make rules for existing suits; and if they make great changes, even if they were to be thought

unreasonable, they would not therefore be void, because the discretion of the Judges is absolute, and their rules final. But, in truth, they operated with perfect fairness on both the litigant parties. *Lord Wensleydale.*

I forgot to say, that the criticism on the language of the rules made in the course of the argument may be well founded. They are not accurately prepared, but their meaning is clear. There is a mistake in the provision as to the "Court of Error," which is copied from the words of the Act. It referred to another Court of Error, but the meaning is perfectly clear, and the inaccuracy cannot possibly lead to a mistake.

I am, therefore, of opinion, that the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord Chelmsford.—My Lords, I cannot help feeling some regret that the learned Barons of the Court of Exchequer did not hesitate a little before they determined to relieve the Crown from the difficulty in which it was placed with respect to a bill of exceptions by issuing the rule in question; because, from the haste in which it was necessarily prepared, in order to render it available for its intended object, scarcely any time could have been afforded them to consider the grave doubts which have subsequently arisen, and which upon reflection might have occurred to themselves, as to their power to meet the emergency in the mode which they adopted. They might also upon consideration have felt, that, however justifiable the occasion might seem, it was not desirable under any circumstances to make a rule which, though in terms calculated for general application, was purposely designed to answer the exigency of a particular case. *Lord Chelmsford.*

To this rule, so introduced, an objection has been taken at your Lordships' bar on account of its supposed retrospective operation. This objection does not appear to have been raised in the Court of Error, though incidentally mentioned in the course of the argument there. Whatever conclusion may be adopted as to the propriety of making the rule at the time and upon the occasion when it was issued, or as to its operation and effect, I am so strongly of opinion it was *ultra vires* of the framers of it, that I think it unnecessary to make any observations upon its alleged invalidity on any other ground.

The short question is, whether the Legislature, by the 26th section of the Queen's Remembrancer's Act (22 & 23 Vict. c. 21.) has given to a majority of the Barons of the Court of Exchequer the power to determine whether it is expedient that there should be a right of appeal in a case in which none existed before.

There is to my mind a sort of *primâ facie* presumption against this having been intended, arising from the consideration that if the Legislature meant to delegate their power in this respect, a very few plain and simple words would have been sufficient to express their intention; but, so far from clearly conveying their meaning, it is so concealed under the language they have em-

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ployed, that the ingenuity of the ablest counsel has been tasked to discover it; and after arguments of great length, both in this House and in the Exchequer Chamber, it is still left in the doubt and uncertainty which must necessarily result from the difference of opinion which it has produced.

Clear and distinct language might have been expected upon an occasion when the Legislature, having ample means of forming a competent judgment of the expediency of allowing an appeal in a particular case, were about to remit to the Judges of a Court the discretion of determining whether such an appeal from their own decisions ought or ought not to be granted. I quite agree with my noble and learned friend (Lord Wensleydale) that it is not necessary that the power should have been "distinctly and unequivocally given," but neither ought it to have been left to a doubtful and conjectural inference from equivocal words.

The whole argument is involved in the construction of the latter part of the 26th section of the Queen's Remembrancer's Act—"And also from time to time," &c. The section has been read so often that I will not trouble the House with it. The words to be principally dwelt upon are "process, practice, and mode of pleading." Now these words "process" and "pleading" are by common consent dismissed, as wholly inappropriate to describe any proceeding which is to be carried on beyond the walls of the Court; and the whole stress of the argument is laid upon the word "practice." But as this word "practice" (more especially looking to the company in which it is found) would in its ordinary meaning be confined, like the other two words, to the Court itself, it has been necessary to pray in aid of the more extensive meaning contended for, the words of the Common Law Procedure Act, 1852, section 148, repeated in the Queen's Remembrancer's Act, section 19, that "the proceeding to error shall be a step in the cause."

The argument then proceeds thus:—Writs of Error being abolished, and appeals substituted, in every case in which error can be brought, the proceedings to the Court of Appeal are proceedings in the Court below, and become part of the practice of the Court. Therefore a statute empowering the Judges of one Court, from which no appeal lies, to assimilate its practice to another, from which a right of appeal exists, necessarily and expressly confers the power to create such an appeal, or the practice of the two Courts would not be uniform.

But this argument appears to be without foundation from the language of the Legislature on which it is rested. It is to be observed that the words used are not "the proceeding *in* error shall be a step in the cause," but "the proceeding to error." It would certainly be an extraordinary provision to enact that the proceedings in one Court shall be part of the practice of another, but not at all to say that every step up to the very door of the Court of Error shall be a proceeding in the Court from which the error proceeds.

The word "practice," however, is said to be a word of wide extent. Mr. Justice Willes says, it applies to "all the proceedings "by which a cause is brought to judgment and execution;" and Chief Justice Erle says, "Throughout the Common Law Pro- "cedure Act and the Queen's Remembrancer's Act, procedure "is used as equivalent to process, practice, and mode of pleading." But the word "procedure" is nowhere used in any of the enactments of the Common Law Procedure Act or of the Queen's Remembrancer's Act. It is merely part of the name by which the first-mentioned Act is to be cited, and a portion of the title of the latter Act. The learned Chief Justice's meaning must therefore be, that the word "procedure" is used by the Legislature as the description of an Act which comprehends provisions as to process, practice, and pleading,—a remark which, with great deference, appears to me to have no force at all in the argument. Mr. Justice Willes also is not quite accurate in saying that the word "practice" is a word applying "to "all the proceedings by which a cause is brought to "judgment and execution." In its ordinary meaning it is undoubtedly distinguished from the "pleadings;" no unimportant part of the proceedings by which a cause is brought to judgment. The learned Judge also, placing no reliance upon the word "process," and of course not on the word "pleading," says, "but, coming to 'practice,' practice is no term of art." Here, again, I must beg leave to differ with him. "Practice," even standing by itself, applies to a part of the proceedings of a Court which are sufficiently distinguishable from the rest to be the subject of books of practice. As to his observation, that one of the heads of such a work will be the head of "Error," that is likely to be the case, because Courts of Error have their practice as well as Courts of Original Jurisdiction. A book of practice therefore, without such a heading, might be regarded as imperfect or incomplete, but it could hardly be called "maimed" (in the view of the learned Judge), because nothing would be cut off from the history of the practice of the other Courts, of which alone upon the supposition it would profess to treat.

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It may be that the word "practice," under certain circumstances, may be as comprehensive in its expression as the argument requires; but it hardly seems a correct mode of ascertaining its meaning, in the place where it is found, to separate it from all the other words with which it is associated, and having thus detached it from its qualifying context to construe it by itself. Even if the term "practice" might in a popular sense be taken to comprehend all the proceedings in a suit from the beginning to the end, yet when the Legislature uses it with the words "process and pleading," it must have a limited meaning assigned to it. And as the practice of a court is as much distinguished from its process and pleading as these portions of the proceedings are from each other, the word "practice" in such a connexion cannot be supposed to have been intended (in the words of Chief Justice Erle) "to include the

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" whole of the suit from the issuing of the first to the execution " of the last process." But attributing the most comprehensive meaning to the word "practice," it is still the practice of the Court of Exchequer to which the statute refers; it is a proceeding in that Court which is to bring the parties to the door of the Court of Error. The practice pointed at does not advance a single step over the threshold of the Court of Appeal. It is applicable to all cases in which a right of appeal previously existed, but has no force whatever to create a new right. To give it that effect would be to confound the distinction (in the words of Mr. Justice Crompton) between "the machinery of the " appeal and the right of appeal."

The view which I have taken of the limited extent of the word "practice" in the 26th section of the Queen's Remembrancer's Act appears to me to receive strong confirmation from other parts of the Act. In several other sections appeals from the Revenue side of the Court of Exchequer are specially provided for; and it may fairly be asked why, if the Legislature intended that there should be an appeal in cases of motions for a new trial, a provision to this effect was not expressly made? It is generally considered to be a sufficient indication of intention when certain things are specifically enumerated, that others not mentioned are not proposed to be included.

Plausible reasons have been suggested why it was necessary that the Act should contain provisions for appeals on special cases, bills of exception, and cases of succession and of legacy duty. Yet no satisfactory explanation has been given why the Legislature should have taken all these under its own direction, and, as if proclaiming its incompetency to decide upon a question of expediency, should have left the only remaining case to be provided for by the delegated discretion of a majority of the Court of Exchequer.

But, even limiting the view to the section in question, the whole frame of it appears to me to militate against the construction which would extend the power of the Barons of the Exchequer to a proceeding beyond the precincts of their own Court. Besides the company in which the word "practice" is found, both clauses of the section provide for the exercise from " time " to time " of the powers which it confers.

It has been argued, and perhaps correctly, that if the Barons possessed the power of giving an appeal, and executed it, it could not be recalled. But this appears to me to prove that the Act could not apply to such an irrevocable power, but was intended to be confined to the adoption of such provisions of the Common Law Procedure Acts with respect to process, practice, and pleading as might properly be subject to alteration "from time to " time," according to the result of experience.

It was argued, that unless the power to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts applies (amongst others) to the clauses giving the rights of appeal on

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motions for new trial, the powers given by the two clauses would be coextensive, and the latter would be merely a repetition of the former. But it appears to me that the two portions of this section may be distinguished from each other, and that each may have its due effect. Alterations in the proceedings on the Revenue side of the Court of Exchequer having been introduced by the Act, some rules would be absolutely required to meet this new state of things. Accordingly, the former part of the section directs the Barons to make such rules as might seem to them *necessary* and proper; but beyond these rules, which were indispensable, the Legislature, considering that some of the provisions of the Common Law Procedure Acts, and the rules of pleading already made for the regulation of the pleading and practice on the Plea side of the Court, might possibly be usefully applied to the Revenue side; but not having the practical experience necessary to enable them to make a selection for themselves, therefore by the latter part of the section they leave to the discretion of the Judges to determine which of these provisions and rules (if any) it is expedient to adopt in order to produce uniformity in the proceedings on both sides of the Court.

My noble and learned friend, Lord Wensleydale, says, "The "words of the latter part of the section, authorizing the Chief "Baron and Barons from time to time by any rule or order to "extend, apply, or adapt *any* of the provisions of the Common "Law Procedure Acts, are quite independent of the clause "authorizing the application of the rules of pleading and "practice." But, with great respect, I would observe, that in this portion of the section the sense is carried on from the words "and also" continuously to the end, that the whole of it must, therefore, be taken together in construction, and then it will appear that it is not to any of the provisions of the Common Law Procedure Acts absolutely that the power applies, but only to such as may seem expedient for making the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side of such Court.

We are thus brought back again to the point upon which the whole controversy turns, viz. the meaning of the word "practice" as it stands in the Act. I have already endeavoured to show that it cannot possibly apply to any proceeding beyond the Court itself, and that therefore those sections of the Common Law Procedure Acts which relate to appeals are not within the range of the discretionary authority intended to be conferred by the Legislature.

My Lords, I have arrived at this conclusion with great reluctance. It is very much to be regretted that the Crown should have been deprived of the means of appealing from the decision of the Court of Exchequer upon a question of national importance. I should have been glad to find some reason for

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supporting the validity of the rule issued by the Barons, but I can discover none.

I must, therefore, act upon the clear conviction of my own judgment, and pronounce my decided opinion in favour of the Respondents.

Lord Kingsdown.

Lord Kingsdown.—My Lords, the argument on the first question in this case as to the power of the Court of Exchequer to make the orders in question has been so entirely exhausted that it would be improper for me to go into it at any length. The reasons assigned by the majority of the Judges in the Exchequer Chamber appear to me to preponderate, and the grounds on which my judgment rests are laid down more clearly than I could state them in the opinion of the Lord Chief Justice.

Previously to the Queen's Remembrancer's Act there were, as I understand, no means of reviewing a decision of the Court of Exchequer on the Revenue side except by writ of error.

Under the two Acts of Common Law Procedure of 1852 and 1854 there were on the Plea side a more simple proceeding in error than by writ of error, and also the several other remedies introduced by the Act of 1854. There was, further, the proceeding by bill of exceptions independently of those Acts.

If all the proceedings in error and appeal applicable to the Plea side of the Court were considered applicable to the Revenue side, there seems no reason why by the Act of 1854 they should not have been extended to both sides. The same observation applies to the Act of 1859. Why, if they were thought by the Legislature to be all applicable, were they not all applied?

But instead of taking that course the Legislature makes a careful selection of some clauses, and omits others. With reference to the particular matter now in question, it omits the appeal from the decision on a motion for a new trial, and gives, as I think, in substitution for it, the proceeding by bill of exceptions.

It has been said that the same relief may be had by both those modes of proceeding, but that there are many difficulties in the latter which are not found in the former.

If this be so, the Crown may have been willing to give the right of review, subject to the restrictions which those difficulties might impose, but no further; but that, contemplating the application of both remedies, the Legislature should itself give the one and the least convenient, and leave it to the Court of Exchequer, at its discretion, to give or withhold the other, is to me quite inconceivable. It may have used words so large as to compel us to say that this power is given; but, if the clause be capable of two constructions, I think that should be adopted which is most consistent with the probable intention to be collected from the other clauses.

When the words of the 26th section are examined, it seems to me that they neither require nor warrant the larger construction.

The clause is introduced for the purpose of enabling and directing the Court of Exchequer to make rules and orders for

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regulating its process, practice, and mode of pleading, with a view to the alterations introduced by the Act, and to making such process, practice, and mode of pleading as nearly as may be uniform on the two sides of the Court.

For this purpose, and as I understand it for this purpose only, it may extend, apply, and adapt any of the provisions of the two Acts of 1852 and 1854.

Read in their ordinary meaning, as applied to proceedings in the Court itself, the words are reasonable, consistent with the other provisions of the Act, and in accordance with what is found in the two Acts referred to. They are consistent also with the provision that the rules may be made from time to time, and with the fact that the same words which apply to the provisions of the two Acts are applied also, in the expressions immediately following, to the rules of pleading and practice on the Plea side of the Court. I am by no means satisfied that there is any redundancy in the language of the clause thus construed; but if there be, it is not, in my opinion, sufficient to outweigh the objections to the other construction.

What the Court of Exchequer has attempted by its orders to do is to give to two Superior Courts, the Exchequer Chamber and the House of Lords, jurisdiction to hear, and to impose upon them the duty of hearing, an appeal against its decisions, with which, except for those orders, those Courts would have neither the duty nor the right to interfere.

Can it possibly be said that this is to regulate the practice of the Courts of Exchequer? All the proceeding which leads to the other Courts, *when those other Courts are open*,—all the proceeding to Error, is a step in the cause, and part of the practice of the Court; but whether the doors of the other Courts are to be open or not surely is not a point of practice in the Inferior Court.

It is said that the Legislature has already given the appeal by means of a bill of exceptions, and that is now proposed to be done is only to do the same thing in a more convenient form.

But the answer to this seems to me to be, that the Legislature has given no general power to the Superior Courts to review the decisions of the Court of Exchequer. It has prescribed certain special modes of proceeding by which this may be done, and has by necessary implication excluded others.

The Law, before the orders, said "the decision of the Court of "Exchequer on a motion for a new trial shall be final." The orders say it shall not be final. It is not a new mode of effecting an object which could already be attained in a different mode. There was no mode whatever then subsisting by which the decision now complained of could have been disturbed. There was a mode by which the necessity of moving for a new trial might have been prevented, but that is quite a different thing; and it is not because that mode has failed (no matter from what cause) that the Court of Exchequer can create a new jurisdiction

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which the Legislature has not created, and in my opinion has not authorized the Court of Exchequer to create.

Having arrived at this conclusion on the first point, I think it unnecessary to say anything on the second.

Judgment.

JUDGMENT.

Die Mercurii, 6° Aprilis 1864.

WHEREAS Friday the 11th day of March last was appointed for hearing counsel upon an appeal wherein Her Majesty's Attorney-General is appellant, and Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann, claiming the "Alexandra," are respondents; complaining (upon a case settled and signed by the Lord Chief Baron of the Court of Exchequer, pursuant to the provisions of "The Common Law Procedure Act," 17 & 18 Victoria, cap. 125.) of a rule dated the 8th of February 1864, made in Her Majesty's Court of Exchequer Chamber in the matter of an information filed by Her Majesty's Attorney-General on behalf of Her Majesty in the Court of Exchequer against the ship "Alexandra" for the forfeiture of the said ship, to which information Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann appeared, and thereupon claimed the said ship; and praying their lordships to reverse the said decision of the said Court of Exchequer Chamber, and to give such judgment and direction in the premises as to this House, in their lordships' great wisdom, should seem meet; counsel were accordingly called in, and were heard as well on Friday the 11th as Monday the 14th and Tuesday the 13th days of March last, when the further consideration of the said appeal was adjourned: And whereas this day was appointed for the further consideration of the said appeal, and due consideration being had thereof, and of what was offered on either side thereon:

It is *ordered* and *adjudged*, by the lords spiritual and temporal in Parliament assembled, that the said rule or decision of the said Court of Exchequer Chamber, dated the 8th of February 1864, appealed against, be, and the same is hereby affirmed; and that the said appeal be, and the same is hereby dismissed this House: And it is further ordered, that the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk of the Parliaments.

COPY WRIT OF DELIVERY of the ship "Alexandra" to the claimants, issued from the Queen's Remembrancer's Office of the Court of Exchequer:—

Writ of Delivery of the ship "Alexandra."

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To Edward Morgan, an officer of our Customs at our port of Liverpool, and to all other officers of our Customs at that port, and to all persons having the custody, possession, or control of the vessel "Alexandra," with her tackle, apparel, furniture, and materials, for us or in our behalf, and to all others whom it may concern.

Whereas you, the said Edward Morgan, have seized to our use as forfeited the said vessel "Alexandra," with her tackle, apparel, furniture, and materials, which by an indenture of appraisement dated the 13th day of April 1863, returned into our Court of Exchequer at Westminster, is appraised at the sum of 9,500*l.*, the property whereof hath been claimed by Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann, who have entered such their claim thereto in our said Court, and pleaded in discharge of the said seizure, and on a verdict of the country the said vessel "Alexandra," with her furniture, tackle, apparel, and materials, was found not to have been forfeited; and by judgment signed in our said Court on the 20th day of April, in the year of our Lord 1864, it was considered that the said vessel "Alexandra," with her tackle, apparel, furniture, and materials, be delivered to the said Hermann James Sillem, Henry Berthon Preston, James Willink, David Wilson Thomas, and William Thompson Mann, or to their assigns: We therefore command you and each and every of you that on receipt of this our writ or notice thereof you deliver or cause to be delivered the said vessel "Alexandra," with her furniture, tackle, apparel, and materials, to the said Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann, or to their assigns, or to the bearer of this our writ, for we will that you be thereof discharged towards us by virtue of these presents. Witness Sir Frederick Pollock, Knt., at Westminster, the 20th day of April in the year of our Lord 1864.

In pursuance of the foregoing writ the vessel was delivered to the claimants on Monday the 25th day of April 1864.

APPENDIX.

PETITION AND JOINT CASE ON APPEAL TO THE HOUSE OF LORDS, WITH AN ABSTRACT OF THE APPENDIX THERETO.

To the Right Honourable THE LORDS SPIRITUAL AND TEMPORAL in Parliament assembled.

The Petition of Her Majesty's Attorney General.

Petition of the Attorney General.

SHEWETH,

That on the 8th day of February, A.D. 1864, a rule was made by Her Majesty's Court of Exchequer Chamber upon an appeal by your Petitioner in a case (a copy of which and of the appendix thereto is hereunto annexed) settled and signed by the Lord Chief Baron of the Court of Exchequer, in the matter of an information filed by Her Majesty's Attorney General on behalf of Her Majesty in the Court of Exchequer, against the ship "Alexandra," for the forfeiture of the said ship, to which information Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann appeared, and thereupon claimed the said ship; which rule is in the words and figures following :—

IN THE EXCHEQUER CHAMBER.

Monday, the 8th day of February, A.D. 1864.

Between HER MAJESTY'S ATTORNEY GENERAL, *Informant*,

and

SILLEM and OTHERS, claiming the "ALEXANDRA," *Defendants*.

On a case stated by way of appeal from the Court of Exchequer.

Upon hearing, on the 6th day of February instant, Sir Hugh McCalmont Cairns, Knight, of Counsel for the Defendants, and upon hearing Sir Roundell Palmer, Knight, Her Majesty's Attorney General, on behalf of the Crown, and upon reading the said case, the Court postponed its decision until this day. Now

Petition of the Attorney General.

it is ordered by the said Court of Exchequer Chamber that the said appeal be and the same is hereby dismissed.

W. H. WALTON, Q.R.

That your Petitioner, being advised that the decision of the said Court of Exchequer Chamber is erroneous, and ought to be reversed, appeals from the said rule.

And your Petitioner prays your Lordships to reverse the said decision, and to give such judgment and direction in the premises as to your Lordships great wisdom shall seem fit and meet.

ROUNDELL PALMER.

Signed by Her Majesty's Attorney General,
In the presence of
F. J. HAMEL,
Solicitor for Her Majesty's Customs.

Joint Case.

Joint Case.

IN THE HOUSE OF LORDS.

On APPEAL from the COURT of EXCHEQUER CHAMBER.

Between HER MAJESTY'S ATTORNEY GENERAL - - - - } *Appellant,*

and

HERMANN JAMES SILLEM, HENRY BERTHON PRESTON, JACOB WILLINK, DAVID WILSON THOMAS, and WILLIAM THOMPSON MANN, claiming the "ALEXANDRA" - } *Respondents.*

JOINT CASE OF APPEAL.

This is an appeal from the decision of the Court of Exchequer Chamber come to on the 8th day of February in the year of our Lord 1864, dismissing the appeal hereafter mentioned.

The appeal to the Court of Exchequer Chamber arose out of an information filed by Her Majesty's Attorney General in the Court of Exchequer on the 25th day of May, A.D. 1863, against the ship "Alexandra," alleging the ship to be forfeited to Her Majesty by reason of certain breaches of the Statute 59 Geo. 3. c. 69., commonly called the Foreign Enlistment Act.

The above-named defendants having appeared and claimed the ship as their property, and having pleaded to the informa-

tion, and issue having been joined on such plea, such issue was tried at the sittings after Trinity Term 1863 before the Right Honourable the Lord Chief Baron and a special jury.

The jury having found their verdict for the defendants, the Attorney General in Michaelmas Term 1863 obtained a rule nisi of the Court of Exchequer for a new trial, on the ground, amongst other grounds, of the misdirection of the learned Judge.

The four learned Judges of the Court of Exchequer, before whom the rule nisi was argued, were divided in opinion as to whether the rule nisi ought to be made absolute or discharged on the ground of misdirection, but the Honourable Mr. Baron Pigott, who was of opinion that the rule ought to be made absolute on the ground of misdirection, having withdrawn his judgment, the rule nisi was, by a subsequent rule made in Hilary Term 1864, ordered to be discharged.

The Attorney General then appealed to the Court of Exchequer Chamber against this decision, under or by virtue of certain rules made by the Lord Chief Baron and three other Barons of the Court of Exchequer on the 4th day of November, A.D. 1863, whereby it was in effect ordered (under the powers given by the Act 22 & 23 Vict. c. 21. s. 26.) that the sections Nos. 35 to 42 inclusive of the Common Law Procedure Act, 1854, should be extended, applied, and adapted to the Revenue Side of the Court of Exchequer.

The Attorney General and the defendants not having agreed on a case to be carried on appeal to the Court of Exchequer Chamber, such case was settled and signed by the Lord Chief Baron, and carried by way of appeal into the Court of Exchequer Chamber.

Such appeal came on to be heard in the Court of Exchequer Chamber on the 8th day of February 1864.

The learned Judges who constituted the Court of Exchequer Chamber on that day differed in opinion; but the majority being of opinion that the appeal ought to be dismissed, it was dismissed accordingly, and the following rule was made:—

IN THE EXCHEQUER CHAMBER.

Monday, the 8th day of February 1864.

Between HER MAJESTY'S ATTORNEY GENERAL - *Informant;*

and

SILLEM and OTHERS, claiming the "Alexandra," - *Defendants.*

On a case stated by way of appeal from the Court of Exchequer, upon hearing on the 6th day of February instant Sir Hugh McCalmont Cairns, Knight, of Counsel for the Defendants, and upon hearing Sir Roundell Palmer, Knight, Her Majesty's Attorney General, on behalf of the Crown, and upon reading the said case, the Court postponed its decision until this day.

Joint Case.

Now it is ordered by the said Court of Exchequer Chamber that the said appeal be and the same is hereby dismissed.

W. H. WALTON, Q.R.

The case referred to in the said rule is the case settled and signed by the Lord Chief Baron, and carried by way of appeal into the Court of Exchequer Chamber.

This case, a copy of which and of the appendix thereto is set forth in the appendix to the present case, contains a statement of the evidence at the trial, and a statement of the summing-up of the learned Judge, and the appendix to that case contains a copy of the information and copies of several other documents, to which also are now appended copies of the judgments of the Barons of the Exchequer on the motion to make the rule nisi for a new trial absolute, the judgments delivered in the Exchequer Chamber, the rules of the Court of Exchequer of 4th November 1863, applying the Common Law Procedure Act, 1854, to the Revenue Side of that Court, and the several sections of the Common Law Procedure Act, 1854, and of the Queen's Remembrancer's Act, upon which those rules were founded.

The ground on which the majority of the Judges in the Court of Exchequer Chamber founded their judgment dismissing the appeal was, that in their lordships' opinion the Court of Exchequer had no power to make the said rule of the 4th November 1863.

The Attorney General submits that the rule nisi of the Court of Exchequer ought to have been made absolute, and that the decision of the Court of Exchequer discharging that rule ought to have been reversed by the Court of Exchequer Chamber, for the following among other reasons:—

APPELLANT'S REASONS.

1. Because the said Judges of the Court of Exchequer had power under the said Act 22 & 23 Vict. c. 21. to make the said rules of the 4th November 1863, and under these rules the Attorney General was entitled to appeal from the said rule of the 8th February 1864.
2. Because at the trial the Lord Chief Baron improperly directed the jury as to the construction and effect of the seventh section of the Statute 59 Geo. 3. c. 69., commonly called "The Foreign Enlistment Act."
3. Because the Lord Chief Baron did not properly explain to the jury at the trial the intention and effect of the said seventh section of the Foreign Enlistment Act.
4. Because the effect of his Lordship's direction to the jury was in substance this:—That a vessel intended to be employed in the service of a foreign belligerent power, to cruize and commit hostilities against another foreign power with whom Her Majesty is at peace, may lawfully be equipped, furnished, or fitted out for that purpose by shipbuilders in this country, without Her

Majesty's licence, under a contract with the agents of such foreign belligerent power, provided it is not intended so far to complete her warlike equipment or armament in this country as to enable her to cruize and commit hostilities against such other power immediately on her passing beyond the territorial jurisdiction of Her Majesty: Whereas his Lordship ought to have directed the jury that all such equipping, furnishing, or fitting out is unlawful, and enures to the forfeiture of the vessel under the statute.

5. Because in his Lordship's summing-up observations were addressed to the jury from which they may naturally have been led to infer that it was equally lawful for a shipbuilder to build and equip a ship of war in this country for and under a contract with a foreign belligerent power, to be employed by such power to cruize and commit hostilities against another foreign power with whom Her Majesty is at peace, as it would be to sell and deliver in this country to the agents of such power any other kind of contraband of war, or to sell and deliver to the agents of such power in this country or elsewhere a ship of war ready made and equipped, without any previous contract or order for that purpose.

ROUNDELL PALMER.
R. P. COLLIER.
ROBERT PHILLIMORE.
JOHN LOCKE.
THOMAS JONES.

The respondents claiming the "Alexandra" submit, for the following among other reasons:—

Respondents' Reasons.

1. That no appeal lay to the Exchequer Chamber from the decision of the Court of Exchequer in discharging the rule nisi for a new trial, and that no appeal lies to the House of Lords either from that decision or from the decision of the Exchequer Chamber in dismissing the appeal to the latter Court.
2. (Under protest against the competency of the present appeal.) That the rule nisi for a new trial was properly discharged by the Court of Exchequer.

H. M. CAIRNS.
JOHN B. KARSLAKE.
GEORGE MELLISH.
JAMES KEMPLAY.

ABSTRACT OF THE APPENDIX TO THE CASE ON APPEAL TO THE HOUSE OF LORDS.

Abstract of appendix to the case on appeal to the House of Lords.

1. The case on appeal to the Exchequer Chamber with its appendix. *Vide Abstract in Appendix to Report of Argument in the Exchequer Chamber, vol.* 3. *pp.* xiii. *to* xxii.

2. The Judgment of the Court of Exchequer on 11th January 1864 on motion to make the rule nisi for a new trial absolute. *Vide Report of Argument in the Court of Exchequer, vol.* 2. *pp.* 525 *to* 571.

3. Notice of appeal to Exchequer Chamber.

4. The Judgment of the Court of Exchequer Chamber on appeal, with Rule of Court thereon. *Vide Report of Argument, vol.* 3. *pp.* 57 *to* 85.

5. Notice of appeal to the House of Lords from decision of the Court of Exchequer.

6. Notice of appeal to the House of Lords from decision of the Court of Exchequer Chamber.

7. Extracts from the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. sections 32 to 42 inclusive, and section 97. *Vide Appendix to Report of Argument in the Exchequer Chamber, vol.* 3. *p.* xi.

8. Extracts from the Queen's Remembrancer's Act, 22 & 23 Vict. ch. 21. sections 9 to 21 inclusive, and sections 21, 26, and 27. *Vide Appendix to Report of Argument in the Exchequer Chamber, vol.* 3. *p.* v.

9. Rules made by the Court of Exchequer, dated 4th Nov. 1863, applying the Common Law Procedure Acts to the Revenue side of that Court. *Vide Appendix to Report of Argument in the Exchequer Chamber, vol.* 3. *p.* i.

GENERAL INDEX to the Proceedings from the commencement of the Trial in the COURT OF EXCHEQUER to the final Judgment in the HOUSE OF LORDS.

v. volume—app. appendix.

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